2-2-2008

Capstar Radio Operating Co. v. Lawrence Clerk's Record v. 1 Dckt. 35120

LAW CLERK Vol. 1 of 4

IN THE SUPREME COURT
OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY,

Plaintiffs/Respondent,

vs

DOUGLAS P LAWRENCE and BRENDA LAWRENCE,

Defendant/Appellant,

CLERK'S RECORD ON
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
FOR THE COUNTY OF KOOTENAI

ATTORNEY FOR APPELLANTS
John P Whelan

ATTORNEY FOR RESPONDENTS
Susan Weeks

SUPREME COURT DOCKET 35120

Volume 1

35120

IN THE SUPPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation Plaintiff/Respondent, vs DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendant/Appellant,	SUPREME COURT NO. 35120

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE JOHN T MITCHELL
District Judge

JOHN P WHELAN
213 N 4th Street
Coeur d'Alene ID 83814

Attorneys for Appellants

SUSAN WEEKS
1626 Lincoln Way
Coeur d'Alene ID 83814

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
11/7/2002	NEWC	SATERFIEL	New Case Filed	John T. Mitchell
		SATERFIEL	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Owens, James Receipt number: 0545626 Dated: 11/07/2002 Amount: $77.00 (Check)	John T. Mitchell
	MOTN	SMITH	Ex Parte Motion for Temporary Restraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of Conrad Agte in Support of Motion for Temporary Trestraining Order	John T. Mitchell
	AFFD	SMITH	Affidavit of Susan Weeks in Support of Motion for Temporary Restraining Order	John T. Mitchell
	SUMI	LEITZKE	Summons Issued	John T. Mitchell
11/8/2002	TROI	LEITZKE	Temporary Restraining Order Issued	John T. Mitchell
	BNDC	SATERFIEL	Bond Posted - Cash (Receipt 545778 Dated 11/08/2002 for 1000.00)	John T. Mitchell
		SATERFIEL	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Owens, James, Vernon & Weeks Receipt number: 0545779 Dated: 11/08/2002 Amount: $3.00 (Check)	John T. Mitchell
		SATERFIEL	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Owens, James, Vernon & Weeks Receipt number: 0545779 Dated: 11/08/2002 Amount: $1.00 (Check)	John T. Mitchell
11/13/2002	HRSC	THORNE	Hearing Scheduled (Preliminary Injunction 11/15/2002 09:30 AM)	John T. Mitchell
	NOTH	SATERFIEL	Notice Of Hearing	John T. Mitchell
11/14/2002	AFSV	SMITH	Affidavit Of Service	John T. Mitchell
	AFSV	SMITH	Affidavit Of Service	John T. Mitchell
11/15/2002	HRHD	THORNE	Hearing result for Preliminary Injunction held on 11/15/2002 09:30 AM: Hearing Held	John T. Mitchell
11/21/2002	ORDR	THORNE	Preliminary Injunction Order	John T. Mitchell
12/2/2002		GLASS	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Ian Smith Receipt number: 0548182 Dated: 12/02/2002 Amount: $47.00 (Check)	John T. Mitchell
	NOAP	GLASS	Notice Of Appearance ONLY	John T. Mitchell
12/20/2002	NOTC	SMITH	Notice of First Access	John T. Mitchell
1/14/2003	NOTC	HILDRETH	Notice of Second Access	John T. Mitchell
5/12/2003	NOTC	SMITH	Notice of Third Access	John T. Mitchell
7/22/2003	AFFD	NORIEGA	Affidavit of Daniel E. Rebeor In Support of Motion For Temporary Restraining Order	John T. Mitchell
8/26/2003	MNWD	SATERFIEL	Motion For Leave To Withdraw As Attorney -- Ian Smith for Defendants	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
8/26/2003	HRSC	THORNE	Hearing Scheduled (Motion to Withdraw 10/10/2003 03:00 PM)	John T. Mitchell
8/27/2003	NOHG	LEITZKE	Notice Of Hearing	John T. Mitchell
9/3/2003	APPL	MARTIN-TOM	Application for Fifth Access	John T. Mitchell
	AFIS	MARTIN-TOM	Affidavit of Susan Weeks in Support of Motion/Application for Fifth Access Order	John T. Mitchell
9/5/2003	HRVC	THORNE	Hearing result for Motion to Withdraw held on 10/10/2003 03:00 PM: Hearing Vacated	John T. Mitchell
	AFFD	GLASS	Affidavit of Douglas Lawrence	John T. Mitchell
	SUBC	GLASS	Substitution Of Counsel Sanuel Eismann	John T. Mitchell
9/9/2003	ORDR	THORNE	Order Granting Request For Fifth Access	John T. Mitchell
9/11/2003	ANSW	PARKER	Answer	John T. Mitchell
9/18/2003	HRSC	THORNE	Hearing Scheduled (Status Conference 12/11/2003 04:00 PM)	John T. Mitchell
	NOTC	THORNE	Notice of Scheduling Conference	John T. Mitchell
	NOTC	HILDRETH	Notice of Fourth Access	John T. Mitchell
	NOTC	HILDRETH	Notice of Fifth Acces	John T. Mitchell
11/4/2003	NOTC	PARKER	Notice of Substitution of Counsel/Samuel Eismann	John T. Mitchell
11/14/2003	NOTD	NORIEGA	Notice Of Deposition of Harold Funk	John T. Mitchell
12/5/2003	NOAP	LEITZKE	Notice Of Appearance (Douglas Lawrence, Pro Se)	John T. Mitchell
	MOTN	LEITZKE	Defendant Lawrence's Motion Requesting the Court Enter an Order in Limine Against Plaintiff Which is Pertinent to the Unanswered and Incomplete Discovery	John T. Mitchell
	MNCL	LEITZKE	Defendant Lawrence's Motion To Compel Plaintiff to Answer Defendant Lawrence's First Interrogatories and Request for Production of Documents	John T. Mitchell
12/11/2003	HRHD	THORNE	Hearing result for Status Conference held on 12/11/2003 04:00 PM: Hearing Held	John T. Mitchell
12/12/2003	HRSC	THORNE	Hearing Scheduled (Court Trial Scheduled 08/09/2004 09:00 AM)	John T. Mitchell
	NOTC	THORNE	Notice of Trial Setting	John T. Mitchell
12/16/2003	ORDR	THORNE	Order For Mediation	John T. Mitchell
12/18/2003	NOAP	DRAPER	Notice Of Appearance/ Brenda Lawrence Pro Se	John T. Mitchell
1/28/2004	HRSC	THORNE	Hearing Scheduled (Motion for Summary Judgment 04/06/2004 04:00 PM)	John T. Mitchell
2/26/2004	NTSV	NORIEGA	Notice Of Service	John T. Mitchell
3/9/2004	AFFD	VICTORIN	Affidavit of Susan Weeks in Support of Motion for Summary Judgment	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
3/9/2004	AFFD	VICTORIN	Affidavit of John Rook in Support of Motion for Summary Judgment	John T. Mitchell
	AFFD	VICTORIN	Affidavit of Harold Funk in Support of Motion for Summary Judgment	John T. Mitchell
	MEMO	VICTORIN	Memorandum in Support of Motion for Summary Judgment	John T. Mitchell
	MNSJ	VICTORIN	Motion For Summary Judgment	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
3/16/2004	HRSC	THORNE	Hearing Scheduled (Motion 04/14/2004 08:30 AM)	John T. Mitchell
	HRSC	THORNE	Hearing Scheduled (Motion to Compel 04/29/2004 03:00 PM)	John T. Mitchell
	HRVC	THORNE	Hearing result for Motion for Summary Judgment held on 04/06/2004 04:00 PM: Hearing Vacated	John T. Mitchell
3/17/2004	MOTN	SWIGART	Motion For Extension of Time to Answer discovery	John T. Mitchell
	FILE	DRAPER	New File Created ********** File 2 of 2 **********	John T. Mitchell
3/22/2004	NOHG	DRAPER	Notice Of Hearing	John T. Mitchell
3/23/2004	MNCL	NORIEGA	Defendant Douglas Lawrence's Motion To Compel Plaintiff Capstar to Answer Defendant Douglas Larwence's First Interrogatories and Request for Production of Documents	John T. Mitchell
	MOTN	NORIEGA	Defendants Lawrences' Motion Requesting the Court Enter an Order in Limine Against Plaintiff Capstar Which is Pertinent to the Unanswered Discovery	John T. Mitchell
	AFFD	NORIEGA	Affidavit of Douglas Lawrence in Support of Defendants Douglas Lawrence's Motion to Compel Plaintiff Capstar to Answer Defendant Lawrence's First Interrogatories and First Request for Production of Documents	John T. Mitchell
	MISC	NORIEGA	Defendants Lawrences Reply In Opposition to Plaintiff's Motion for Summary Judgment	John T. Mitchell
	AFFD	NORIEGA	Affidavit of Douglas Lawrence in Support of Defendants Lawrences' Reply in Opposition to Plaintiffs Motion for Summary Judgment	John T. Mitchell
	MISC	NORIEGA	Defendant Douglas Lawrence's First Set of Requests for Admissions to Plaintiff Capstar	John T. Mitchell
	AFFD	NAYLOR	Affidavit of John W Mack in Support of Defendants Lawrences' Reply in Opposition to Plaintiffs Motion for Summary Judgment	John T. Mitchell
3/24/2004	NOHG	ROBINSON	Notice Of Hearing	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
3/31/2004	MOTN	SWIGART	Defendants Lawrences' Motion To Vacate the April 14th Hearing on Plaintiff's Motion for Summary Judgement and To Request a Continuance to Review Plaintiff's Answers to Defendants Discovery and To Take the Deposition of Harold Fund and Others	John T. Mitchell
	NTSD	SWIGART	Notice Of Service Of Discovery	John T. Mitchell
4/6/2004	AFFD	NORIEGA	Affidavit of Kelvin Brownsberger	John T. Mitchell
	AFFD	NORIEGA	Affidavit of Susan Weeks in Opposition to Lawrence's Motion to Vacate the April 14, 2004 Summary Judgment Hearing	John T. Mitchell
	MOTN	NORIEGA	Motion to Strike	John T. Mitchell
	MOTN	NORIEGA	Motion for Protective Order and Limitation of Discovery	John T. Mitchell
	MISC	NORIEGA	Reply Brief in Support of Plaintiff's Motion for Summary Judgment	John T. Mitchell
	MISC	NORIEGA	Brief in Support of Motion for Protective Order and Limitation of Discovery	John T. Mitchell
4/14/2004	HRHD	THORNE	Hearing result for Motion for Summary Judgment held on 04/14/2004 08:30 AM: Hearing Held	John T. Mitchell
4/16/2004	MOTN	VICTORIN	Motion for Final Entry of Judgment	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
4/22/2004	HRSC	THORNE	Hearing Scheduled (Motion to Reconsider 05/20/2004 10:00 AM)	John T. Mitchell
	MOTN	VICTORIN	Defendants Lawrences' Motion for Reconsideration of the Court's Partial Summary Judgment of April 14, 2004	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
4/28/2004	MOTN	LEITZKE	Motion to Shorten Time	John T. Mitchell
	NOHG	LEITZKE	Notice Of Hearing	John T. Mitchell
4/29/2004	INHD	RICKARD	Hearing result for Motion to Compel held on 04/29/2004 03:00 PM: Interim Hearing Held	John T. Mitchell
5/20/2004	HRVC	THORNE	Hearing result for Motion to Reconsider held on 05/20/2004 10:00 AM: Hearing Vacated	John T. Mitchell
7/27/2004	HRVC	THORNE	Hearing result for Court Trial Scheduled held on 08/09/2004 09:00 AM: Hearing Vacated	John T. Mitchell
1/24/2005	NOPD	MEYER	Notice Of Proposed Dismissal Issued	John T. Mitchell
2/10/2005	NOAP	JANUSCH	Notice Of Appearance-John Whalen for Douglas Lawrence	John T. Mitchell
	AFFD	JANUSCH	Affidavit of Retention of John Whelan	John T. Mitchell
	AFFD	JANUSCH	Affidavit of Retention	John T. Mitchell
6/7/2005	CVDI	VICTORIN	Civil Disposition entered for: Capstar Radio Operating Company, Plaintiff; Lawrence, Brenda J, Defendant; Lawrence, Douglas P, Defendant. order date: 06/07/2005	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
6/7/2005	FJDE	VICTORIN	Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title	John T. Mitchell
	STAT	DUBE	Case status changed: closed pending clerk action. Closed in District Court. Appeal filed 7/7/05 and Bond Posted.	John T. Mitchell
7/7/2005		VICTORIN	Filing: T - Civil Appeals To The Supreme Court Paid by: John Whelan Receipt number: 0658477 Dated: 07/07/2005 Amount: $9.00 (Check)	John T. Mitchell
	BNDC	VICTORIN	Bond Posted - Cash (Receipt 658478 Dated 07/07/2005 for 100.00)	John T. Mitchell
7/8/2005	APSC	VICTORIN	Appealed To The Supreme Court	John T. Mitchell
	MISC	VICTORIN	Clerk's Certificate of Appeal	John T. Mitchell
8/10/2005	NLTR	MCCOY	Notice of Lodging Transcript	John T. Mitchell
9/8/2005	MISC	MO'REILLY	Receipt For Records	John T. Mitchell
9/20/2005	BNDC	MCCOY	Bond Posted - Cash (Receipt 667855 Dated 09/20/2005 for 24.80)	John T. Mitchell
	MISC	JREYNOLDS	Receipt for Records	John T. Mitchell
10/6/2005	BNDV	MCCOY	Bond Converted (Transaction number 9489841 dated 10/06/2005 amount 24.80)	John T. Mitchell
	BNDV	MCCOY	Bond Converted (Transaction number 9489842 dated 10/06/2005 amount 100.00)	John T. Mitchell
5/3/2006	BNDE	MCCOY	Cash Bond Exonerated (Amount 1,000.00)	John T. Mitchell
1/31/2007	FILE	VICTORIN	**********File #3 Created**********	John T. Mitchell
2/1/2007	ORDR	PARKER	Supreme Court Opinion	John T. Mitchell
3/30/2007	REMT	JANUSCH	Remittitur	John T. Mitchell
4/20/2007	HRSC	CLAUSEN	Hearing Scheduled (Pre-Trial Conference 05/14/2007 03:00 PM) Set W/CV03-4621	John T. Mitchell
	STAT	CLAUSEN	Case status changed: Reopened	John T. Mitchell
		CLAUSEN	Notice of Hearing	John T. Mitchell
5/1/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion for Summary Judgment 06/13/2007 03:00 PM) set W/CV03-4621 - Weeks	John T. Mitchell
5/14/2007	MEMO	VICTORIN	Memorandum in Support of Renewed Motion for Summary Judgment	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
	MISC	REMPFER	Renewed motion for summary judgment	John T. Mitchell
	HRHD	CLAUSEN	Hearing result for Pre-Trial Conference held on 05/14/2007 03:00 PM: Hearing Held Set W/CV03-4621	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Court Trial Scheduled 12/10/2007 09:00 AM) 4 Days	John T. Mitchell
5/16/2007		CLAUSEN	Notice of Hearing	John T. Mitchell
5/29/2007	ANHR	VICTORIN	Amended Notice Of Hearing	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
5/31/2007	MOTN	HULL	Motion for Enlargement	John T. Mitchell
	AFFD	HULL	Affidavit of John Mack in Support of Defendants' Motion for Enlargement	John T. Mitchell
	AFFD	HULL	Affidavit of Douglas Lawrence	John T. Mitchell
	AFFD	HULL	Affidavit of John P. Whelan	John T. Mitchell
	NOHG	LEPIRE	Notice Of Hearing	John T. Mitchell
6/5/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 06/13/2007 03:00 PM) Enlargement of Time; Shorten Time and Disqualification for Cause - Whelan	John T. Mitchell
6/6/2007	MEMO	VICTORIN	Reply Memorandum in Support of Renewed Motion for Summary Judgment	John T. Mitchell
	AFFD	VICTORIN	Affidavit of John Whelan	John T. Mitchell
	APPL	VICTORIN	Application for Order Shortening Time	John T. Mitchell
	MNDQ	VICTORIN	Motion To Disqualify	John T. Mitchell
6/7/2007	MOTN	VICTORIN	Motion to Strike Portions of Affidavit of Douglas Lawrence Filed 5-30-07 & Notice of Hearing	John T. Mitchell
	MOTN	HULL	Motion to Strike Portions of Affidavit of John Mack Filed 5/30/07	John T. Mitchell
	NOTH	MCCORD	Notice Of Hearing	John T. Mitchell
	NOTH	MCCORD	Notice Of Hearing	John T. Mitchell
6/8/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 06/13/2007 03:00 PM) Set W/CV03-4621 - Weeks - Strike Affd John Mack & Portion Affd Doug Lawrence	John T. Mitchell
6/13/2007	ORDR	CLAUSEN	Order Shortening Time	John T. Mitchell
	HRVC	CLAUSEN	Hearing result for Motion held on 06/13/2007 03:00 PM: Hearing Vacated Set W/CV03-4621 - Weeks - Strike Affd John Mack & Portion Affd Doug Lawrence	John T. Mitchell
	HRHD	CLAUSEN	Hearing result for Motion for Summary Judgment held on 06/13/2007 03:00 PM: Hearing Held set W/CV03-4621 - Weeks	John T. Mitchell
	HRHD	CLAUSEN	Hearing result for Motion held on 06/13/2007 03:00 PM: Hearing Held Enlargement of Time; Shorten Time and Disqualification for Cause - Whelan	John T. Mitchell
6/25/2007	ORDR	CLAUSEN	Memorandum Decision and Order Denying Motion for Disqualification for Cause	John T. Mitchell
6/26/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion for Summary Judgment 08/07/2007 04:00 PM) Weeks - Set w/CR03-4621	John T. Mitchell
7/9/2007	MOTN	VICTORIN	Motion for Reconsideration	John T. Mitchell
	MOTN	VICTORIN	Motion for Permission to Appeal from an Interlocutory Order	John T. Mitchell
	AFFD	VICTORIN	Affidavit of John P Whelan	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
7/10/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion to Reconsider 08/06/2007 01:30 PM) Whelan - set W/CR03-4621	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 08/06/2007 01:30 PM) Permission to Appeal - Whelan	John T. Mitchell
	NOHG	MCCOY	Notice Of Hearing	John T. Mitchell
	NOHG	MCCOY	AMENDED Notice Of Hearing	John T. Mitchell
7/23/2007	AFFD	MCCOY	Supplemental Affidavit of John P. Whelan	John T. Mitchell
	MEMS	MCCOY	Memorandum In Support Of Motion for Reconsideration	John T. Mitchell
	FILE	VICTORIN	**********File #4 Created**********	John T. Mitchell
7/24/2007	MISC	CLAUSEN	Amended Supplemental Affidavit of John P. Whelan	John T. Mitchell
	AFFD	HULL	Amended Supplemental Affidavit of John P. Whelan (with Exhibit Attached)	John T. Mitchell
	MISC	MCCOY	Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff	John T. Mitchell
	MISC	MCCOY	Request for Judicial Notice	John T. Mitchell
	MOTN	MCCOY	Motion for Enlargement	John T. Mitchell
	MOTN	MCCOY	Motion to Strike	John T. Mitchell
	NOHG	MCCOY	Notice Of Hearing	John T. Mitchell
	AFFD	MCCOY	Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment	John T. Mitchell
	FILE	NAYLOR	New File Created--File 5 of 5 ********EXPANDO***** containing Certificates of Exhibits dated March 23,2004	John T. Mitchell
7/26/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 08/07/2007 04:00 PM) Enlargement of Time; Strike & Request for Judicial Notice - Whelan	John T. Mitchell
7/30/2007	MISC	MCCORD	plaintiff's opposition to def's motion for reconsideration	John T. Mitchell
7/31/2007	MISC	HUFFMAN	Plaintiff's Motion to Strike or in the Alternative for Enlargement of Time to File Responses	John T. Mitchell
	FILE	JANUSCH	New File Created ***6*****	John T. Mitchell
8/2/2007	MOTN	PARKER	Motion to Strike Portions of Affidavit of Douglas Lawrence filed July 24, 2007	John T. Mitchell
	AFFD	PARKER	Affidavit of Weeks in Support of Motion to Strike Lawrence Testimony	John T. Mitchell
	MOTN	PARKER	Motion to Shorten Time	John T. Mitchell
	MISC	PARKER	Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment	John T. Mitchell
	NOTH	PARKER	Notice Of Hearing	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
8/6/2007	DENY	CLAUSEN	Hearing result for Motion to Reconsider held on 08/06/2007 01:30 PM: Motion Denied Whelan - set W/CR03-4621	John T. Mitchell
	DENY	CLAUSEN	Hearing result for Motion held on 08/06/2007 01:30 PM: Motion Denied Permission to Appeal - Whelan	John T. Mitchell
8/7/2007	ORDR	CLAUSEN	Order Denying Defendants' Motion to Reconsider and Motion for Permissive Appeal	John T. Mitchell
	CONT	CLAUSEN	Hearing result for Motion for Summary Judgment held on 08/07/2007 04:00 PM: Continued Weeks - Set w/CR03-4621	John T. Mitchell
	HELD	CLAUSEN	Hearing result for Motion held on 08/07/2007 04:00 PM: Motion Held Enlargement of Time; Strike & Request for Judicial Notice - Whelan	John T. Mitchell
8/8/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion for Summary Judgment 09/24/2007 04:00 PM) 1 hour	John T. Mitchell
		CLAUSEN	Notice of Hearing	John T. Mitchell
8/16/2007	MOTN	MCCORD	plaintiff's Motion for protective order re. def's notice of deposition	John T. Mitchell
	OBJT	MCCORD	Objection to notice of deposition & demand for production of documents	John T. Mitchell
	NOTC	BARKER	Notice Of Delivery Of Original Transcript	John T. Mitchell
8/20/2007	MISC	HUFFMAN	Amended Notice of Deposition and Demand for Production of Documents	John T. Mitchell
8/21/2007	MISC	MCCOY	Subpoena Duces Tecum	John T. Mitchell
	NOTC	MCCOY	Notice of Deposition and Demand for Production of Documents	John T. Mitchell
	NOTC	MCCOY	AMENDED Notice of Deposition and Demand for Production of Documents	John T. Mitchell
9/10/2007	MOTN	VICTORIN	Motion for Leave to File Amended Answer	John T. Mitchell
	AFFD	VICTORIN	Affidavit of John Whelan in Suppoer of Defendants' Opposition to Plaintiff's Renewed Motion for Summary Judgment and in Support of Defendants' Motion for Leave to Amend Answer	John T. Mitchell
	AFFD	VICTORIN	Affidavit of Douglas Lawrence in Suppoer of Opposition to Renewed Motion for Summary Judgment	John T. Mitchell
	MISC	VICTORIN	Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
9/11/2007	ORDR	CLAUSEN	Order Denying Defendants' Motion for Reconsideration	John T. Mitchell
	ORDR	CLAUSEN	Order Granting Defendants' Motion for Enlargement and Granting Continuance of Summary Judgment	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
9/11/2007	ORDR	CLAUSEN	Order Granting Defendants' Request for Judicial Notice of the Court Files	John T. Mitchell
	ORDR	CLAUSEN	Order on Defendants' Motion to Strike	John T. Mitchell
9/12/2007	NOTR	GBROWN	Notice Of Transcript Delivery of Harold Funk	John T. Mitchell
9/17/2007	MOTN	PARKER	Motion to Strike Portions of Affidavit of Doug Lawrence filed September 10, 2007	John T. Mitchell
	MISC	PARKER	Plaintiff's Supplemental Reply Memorandum in Support of Motion for Summary Judgment	John T. Mitchell
	MOTN	PARKER	Motion to Shorten Time	John T. Mitchell
	NOTH	PARKER	Notice Of Hearing	John T. Mitchell
	FILE	VICTORIN	**********File #7 Created**********	John T. Mitchell
9/18/2007	ORDR	CLAUSEN	Order on Plaintiff's Motion to Strike Defendants' Pleadings or in the Alternative for Enlargement of Time	John T. Mitchell
	ORDR	CLAUSEN	Order on Plaintiff's Motion to Strike Portions of Affidavit of Douglas Lawrence Filed July 24, 2007	John T. Mitchell
9/21/2007	MOTN	GBROWN	Motion	John T. Mitchell
	MOTN	GBROWN	Motion	John T. Mitchell
9/24/2007	MOTN	HUFFMAN	Motion to Correct Judgment	John T. Mitchell
	MOTN	HUFFMAN	Motion to Shorten Time	John T. Mitchell
	HRHD	CLAUSEN	Hearing result for Motion for Summary Judgment held on 09/24/2007 04:00 PM: Hearing Held 1 hour	John T. Mitchell
9/26/2007	ORDR	CLAUSEN	Order on Motion for Leave to Amend Answer	John T. Mitchell
10/11/2007	NTSV	GBROWN	Notice Of Service of Discovery	John T. Mitchell
10/25/2007	NOTR	GBROWN	Notice Of Transcript Delivery for Kosta Panidis and Kent Abendroth	John T. Mitchell
10/26/2007	NTSV	HUFFMAN	Notice Of Service	John T. Mitchell
10/29/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 10/31/2007 04:00 PM) Allow Access - Weeks	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 10/31/2007 04:00 PM) Shorten Time - Weeks	John T. Mitchell
	APPL	CLAUSEN	Application for Sixth Access	John T. Mitchell
	MOTN	CLAUSEN	Motion to Shorten Time	John T. Mitchell
	NOTH	CLAUSEN	Notice Of Hearing on Sixth Access	John T. Mitchell
	NOTH	CLAUSEN	Notice Of Hearing of Hearing on Motion to Shorten Time	John T. Mitchell
10/31/2007	GRNT	CLAUSEN	Hearing result for Motion held on 10/31/2007 04:00 PM: Motion Granted Shorten Time - Weeks	John T. Mitchell
	GRNT	CLAUSEN	Hearing result for Motion held on 10/31/2007 04:00 PM: Motion Granted Allow Access - Weeks	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
10/31/2007	ORDR	CLAUSEN	Order Allowing for Shortened Time in Which to Hear Application	John T. Mitchell
	ORDR	CLAUSEN	Order Granting Request for Sixth Access	John T. Mitchell
11/2/2007	MISC	HUFFMAN	Objection to Form of Order Granting Sixth Access	John T. Mitchell
11/5/2007	NOTC	CLAUSEN	Notice of Delivery of Transcript of Hearing Dated 10/31/07	John T. Mitchell
11/7/2007	MNDQ	VICTORIN	Renewed Motion To Disqualify for Cause	John T. Mitchell
	AFFD	VICTORIN	Affidavit of John Whelan in Support of Renewed Motion for Disqualification	John T. Mitchell
	NOTH	CLAUSEN	Notice Of Hearing - Renewed Motion for DQ	John T. Mitchell
11/8/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/27/2007 03:30 PM) Renewed Motion for DQ - Whelan 1/2 hour	John T. Mitchell
	NOTC	CLAUSEN	Notice of Delivery of Original Transcript from Hearing Dated 8/7/07	John T. Mitchell
	NOTC	CLAUSEN	Notice of Delivery of Original transcript from Hearing Dated 6/13/07	John T. Mitchell
	NOHG	LSMITH	Notice Of Hearing	John T. Mitchell
11/13/2007	MOTN	VICTORIN	Renewed Motion for Permission to Appeal from an Interlocutory Order	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion to Continue 11/27/2007 03:30 PM) Court Trial - Weeks	John T. Mitchell
	MNCN	VICTORIN	Motion To Continue Trial	John T. Mitchell
	NOTC	VICTORIN	Notice of Change of Address	John T. Mitchell
	NOHG	VICTORIN	Notice Of Hearing	John T. Mitchell
	NTSV	HUFFMAN	Notice Of Service Susan P Weeks by Fax 11/12/07	John T. Mitchell
	NTSV	HUFFMAN	Notice Of Service Susan P Weeks 11/13/07	John T. Mitchell
11/14/2007	FILE	JANUSCH	New File Created****7**********	John T. Mitchell
11/15/2007	HRSC	CLAUSEN	Hearing Scheduled (Motion 11/27/2007 03:30 PM) Renewed Motion for Permission to Appeal - Whelan	John T. Mitchell
11/21/2007	MISC	MCCOY	Response to Second Motion to Disqualify	John T. Mitchell
11/26/2007	MISC	HUFFMAN	Exhibit List	John T. Mitchell
	MISC	HUFFMAN	Witness List	John T. Mitchell
11/27/2007	DENY	CLAUSEN	Hearing result for Motion held on 11/27/2007 03:30 PM: Motion Denied Renewed Motion for DQ - Whelan 1/2 hour	John T. Mitchell
	HELD	CLAUSEN	Hearing result for Motion held on 11/27/2007 03:30 PM: Motion Held Renewed Motion for Permissive Appeal - Whelan	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
11/27/2007	GRNT	CLAUSEN	Hearing result for Motion to Continue held on 11/27/2007 03:30 PM: Motion Granted Court Trial - Weeks	John T. Mitchell
	HRVC	CLAUSEN	Hearing result for Court Trial Scheduled held on 12/10/2007 09:00 AM: Hearing Vacated 4 Days	John T. Mitchell
11/30/2007	HRSC	CLAUSEN	Hearing Scheduled (Court Trial Scheduled 06/09/2008 09:00 AM) 5 Days	John T. Mitchell
		CLAUSEN	Notice of Hearing	John T. Mitchell
	ORDR	CLAUSEN	Memorandum Decision and Order Denying Defendants' Renewed Motion for Permission to Appeal From an Interlocutory Order	John T. Mitchell
12/3/2007	MISC	SHEDLOCK	Expert Witness Disclosure	John T. Mitchell
12/10/2007	NOTC	CLAUSEN	Notice of Delivery of Original Transcript from 11/27/07	John T. Mitchell
1/4/2008	WITD	BAXLEY	Expert Witness Disclosure of Defendants *Douglas and Brenda Lawrence*	John T. Mitchell
2/6/2008	ORDR	CLAUSEN	Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment	John T. Mitchell
	HRVC	CLAUSEN	Hearing result for Court Trial Scheduled held on 06/09/2008 09:00 AM: Hearing Vacated 5 Days - 1st Priorty	John T. Mitchell
2/26/2008	HRSC	CLAUSEN	Hearing Scheduled (Motion 04/23/2008 04:00 PM) Presentment of Judgment	John T. Mitchell
3/19/2008		VICTORIN	Filing: T - Civil Appeals To The Supreme Court ($86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: John Whelan Receipt number: 0787292 Dated: 3/19/2008 Amount: $15.00 (Check) For: [NONE]	John T. Mitchell
	BNDC	VICTORIN	Bond Posted - Cash (Receipt 787298 Dated 3/19/2008 for 100.00)	John T. Mitchell
	APSC	VICTORIN	Notice of Appeal To The Supreme Court	John T. Mitchell
3/20/2008	NOTE	VICTORIN	Clerk's Certificate of Appeal to Supreme Crt	John T. Mitchell
4/1/2008	ORDR	JANUSCH	Order-Supreme Court	John T. Mitchell
	ORDR	JANUSCH	Order Augmenting Appeal	John T. Mitchell
4/9/2008	HRVC	CLAUSEN	Hearing result for Motion held on 04/23/2008 04:00 PM: Hearing Vacated Presentment of Judgment	John T. Mitchell
	APSC	MCCORD	Amended Appealed To The Supreme Court	John T. Mitchell
5/23/2008	NOTC	JANUSCH	Notice of Transcript Lodged-Julie Foland	John T. Mitchell
6/24/2008	ORDR	VICTORIN	Order Granting Motion for Extension of Time to File Clerk's Record	John T. Mitchell
7/29/2008	RECT	RABROWN	Receipt Of Clerk's Transcript on 07/28/08	John T. Mitchell
8/14/2008	BNDV	ROBINSON	Bond Converted (Transaction number 9499657 dated 8/14/2008 amount 100.00)	John T. Mitchell

Capstar Radio Operating Company vs. Douglas P Lawrence, Brenda J Lawrence

Date	Code	User		Judge
9/9/2008	ORDR	VICTORIN	Order granting motion to Withdraw as Attorney of Record/John Whelan	John T. Mitchell

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 32090

CV02-7471

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff-Respondent,

v.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants-Appellants.

Lewiston, August 2006 Term

2007 Opinion No. 13

Filed: January 26, 2007

Stephen W. Kenyon, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, for the County of Kootenai. Hon. John T. Mitchell, District Judge.

The summary judgment order is vacated and the case is remanded.

John P. Whelan, P.C., Coeur d'Alene, for appellants. John P. Whelan argued.

Owen, James, Vernon and Weeks, Coeur d'Alene, for respondent. Susan P. Weeks argued.

JONES, Justice

Capstar Radio Operating Company filed suit to declare the existence of an easement over property owned by Douglas and Brenda Lawrence. The Lawrences appeal from the district court's grant of summary judgment finding a twenty foot wide express easement across their property. We vacate the summary judgment and remand to the district court for further proceedings.

I.

The Lawrences and Capstar own parcels of property on Blossom Mountain south of Post Falls. The "Lawrence parcel" is located in the southeast quarter of section 21 and the "Capstar parcel" is located to the east in the southwest quarter of section 22. From a public road, known as Signal Point Road, Capstar seeks an easement to access its

A.

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c). If there is no genuine issue of material fact, "only a question of law remains, over which this Court exercises free review." *Watson*, 141 Idaho at 504, 112 P.3d at 792.

B.

The Lawrences argue that Capstar, a Delaware corporation, lacks standing to bring this suit because it did not have a certificate of authority to operate as a foreign corporation in Idaho under I.C. § 30-1-1502(1). The Lawrences contend that the statute is jurisdictional and that Capstar must first prove it has authority to operate in Idaho before filing a lawsuit. "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006).

I.C. § 30-1-1502(1) provides that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." Assuming without deciding that I.C. § 30-1-1502(1) is jurisdictional, the statute is inapplicable here. Capstar owns its property, but "transacting business" does not include the ownership of real property. I.C. § 30-1-1501(2)(i). The Lawrences did not allege any other business Capstar conducted in Idaho to cause Capstar to subject itself to the statute, so I.C. § 30-1-1502(1) is inapplicable here. *See Gebrueder Heidemann, K.G. v. A.M.R. Corp.*, 107 Idaho 275, 282, 688 P.2d 1180, 1187 (1984) (under a similar prior statute, German corporation did not transact business in Idaho as statutorily defined, so it was not required to obtain a certificate of authority before maintaining an action in Idaho). I.C. § 30-1-1502(1) does not deprive Capstar of standing.

withholding title to a portion of the conveyed property." *Akers*, 142 Idaho at 301, 127 P.3d at 204.

The district court determined that the language in the sale agreement was unambiguous and that such language created an express easement in favor of the Capstar parcel. The determination of whether a document is ambiguous is a question of law over which this Court exercises free review. *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Id.*

The district court apparently concluded for purposes of its bench ruling that the easement was of the first variety mentioned above – one created by a written agreement. We thus examine the sale agreement to determine whether the language therein can be construed to grant an easement over property, then owned by the Funks and now owned by the Lawrences in the southeast quarter of Section 21, for the benefit of property in the southwest quarter of Section 22, then owned by the Funks and now owned by Capstar.

In determining that the sale agreement created an express easement the court focused upon the following language in paragraph 5: "Subject to and including an ingress egress easement over this and adjoining property in said sections 21 and 22 owned by the grantor . . ." The question is whether the parties made clear their intention to establish a servitude over the Section 21 parcel subsequently acquired by the Lawrences for the benefit of other unspecified property owned by the Funks in Sections 21 and 22. There is nothing in the sale agreement that indicates an immediate grant of easement rights. Indeed, the Funks could not then have granted themselves an easement over the property being sold to Human Synergistics since they were the record owners of fee title at the time. At most, this language gave the Funks the right to obtain an access easement over the Lawrence parcel for the benefit of some other unspecified property owned by the Funks in sections 21 and 22, at such time as the purchase price was paid and the deed was delivered in accordance with the sale agreement. This was a title retaining contract where the grant of the Lawrence parcel (and the creation of any easement over it) was contingent upon the future fulfillment of the sale agreement. The

holding. Language simply "excepting" easements "in view and or record," in and of itself, would not suffice to make clear the intention of the parties to establish a servitude. Further, the *Seccombe* court, appeared to confuse creation of an easement by reservation with creation of one by exception. The Court of Appeals first stated "we believe the evidence supports the finding of an easement by reservation" (115 Idaho at 435, 767 P.2d at 278), but then goes on to hold that the language excepting easements "in view and or record" created an easement, "whether by reservation or by exception." (115 Idaho at 437, 767 P.2d at 280). It must be one or the other, it can't be both. It is not the intention of this Court to overrule the *Seccombe* holding but, rather, to advise the parties below that it is a fairly slender reed upon which to cling.

It is unfortunate that the district court confined the summary judgment proceeding to the express easement issue, as it appears the case might have been brought to a conclusion based on evidence that was submitted with respect to Capstar's other theories but not considered on summary judgment. The court indicated that because of outstanding discovery, it would not address the other theories being pursued by Capstar. It would have been preferable to allow that discovery to be completed so that the court would have had the ability to rule on the other theories.

D.

Both parties requested attorney fees on appeal pursuant to I.C. § 12-121. We will award attorney fees if the appeal "was brought or defended frivolously, unreasonably, or without foundation." *Callaghan v. Callaghan*, 142 Idaho 185, 191, 125 P.3d 1061, 1067 (2005). Neither party acted frivolously in this appeal so we decline to award fees.

III.

The district court's order for summary judgment is vacated and the case is remanded to that court for further proceedings consistent with this opinion. No costs or fees to either party.

Chief Justice SCHROEDER, and Justices TROUT and BURDICK **CONCUR**.

an easement in the real estate contract would be irrelevant. The district court erred in attempting to create an easement based upon the real estate contract.

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Opinion entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 1/26/07

STEPHEN W. KENYON
Clerk

By: Deputy

In the Supreme Court of the State of Idaho

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,	)	
Plaintiff-Respondent,	)	
v.	)	REMITTITUR
DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,	)	NO. 32090
Defendants-Appellants.	)	CV 02 7671

TO: FIRST JUDICIAL DISTRICT, COUNTY OF KOOTENAI.

The Court having announced its Opinion in this cause January 26, 2007, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required.

DATED this 20th day of February, 2007.

Stephen Kenyon
Clerk of the Supreme Court
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 MAY 14 PM 2:53

CLERK DISTRICT COURT

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	Case No. CV 02-7671 RENEWED MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff, by and through their attorney of record, and moves the Court pursuant to I.R.C.P. 56 for an order granting summary judgment in favor of the above-named Plaintiff for relief demanded in the complaint.

The grounds for this motion are that there is no genuine issue in this case as to any material fact and the Plaintiff is entitled to judgment as a matter of law. This motion is based upon I.R.C.P. 56, the attached memorandum in support of this motion, and the affidavits and documents on file herein.

Oral argument is respectfully requested.

DATED this 14th day of May, 2007.

JAMES, VERNON & WEEKS, P.A.

BY: Susan P. Weeks
SUSAN P. WEEKS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	U.S. Mail	☐	Overnight Mail
☑	Hand Delivered	☐	Telecopy (FAX)

John P. Whelan
213 4th Street
Coeur d'Alene, ID 83816

Susan P. Weeks

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 MAY 14 PM 1:48

CLERK DISTRICT COURT

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. CV 02-7671

MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

The Court's ruling that Plaintiff had an express easement in this matter was appealed to the Idaho Supreme Court. The Supreme Court ruled there was no express easement. The Supreme Court noted that it appeared that the case might have been brought to a conclusion based upon Capstar's other theories. A remittitur was issued February 20, 2007. Defendants have taken no further action on the case. This renewed summary judgment raises for the Court's consideration those other theories of easement advanced by Capstar earlier. Although contained

in the original summary judgment, for ease of argument, this memorandum reiterates those facts and arguments previously raised.

I. UNDISPUTED FACTS

1. The Defendants, Doug and Brenda Lawrence, own a fee simple interest in real property described as the Northeast Quarter of the Southeast Quarter, the East half of the Northwest Quarter of the Southeast Quarter and the East half of the Southeast Quarter of the Southeast Quarter, all located in Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho hereinafter referred to as the "Lawrence parcel". (Answer to Complaint 2.)

2. The relevant portions of the chain of title of the Lawrence parcel are as follows: Pike W. Reynolds and Agnes E. Reynolds, husband and wife, owned the parent parcel from which the Lawrence parcel was later segregated, then transferred it to Edward P. Raden and Colleen J. Raden, husband and wife, and Harold F. Marcoe and Viola G. Marcoe, husband and wife. Radens and Marcoes transferred the parent parcel to Harold A. Funk and Marlene A. Funk, husband and wife. Funks segregated and transferred the Lawrence parcel to Human Synergistics, Inc., a Minnesota corporation. Human Syngergistics, Inc. transferred the Lawrence parcel to Don E. Johnston and Fern A. Johnston, husband and wife, and John McHugh and Mary Ann McHugh, husband and wife. Johnstons and McHughs then transferred the Lawrence parcel to National Associated Properties, Inc., an Idaho Corporation. National Associated Properties, Inc. transferred the Lawrence parcel to Arman and Mary Jane Farmanian, husband and wife. Arman and Mary Jane Farmanian sold the property to Doug and Brenda Lawrence, husband and wife. See Weeks Affidavit in Support of Motion for Summary Judgment, Exhibits A - 1.

3. Plaintiff Capstar Radio Operating Co. ("Capstar") owns a parcel of property situated in the Southwest Quarter of Section 22, Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho, more particularly described as follows:

> Beginning at the Southwest corner, a one-half inch iron pipe that bears North 66° 21' East, 932.30 feet from the Southwest section corner of said Section 22; thence, North 13°37' West, 365.96 feet to a one-half inch iron pipe; thence, North 76°22' East, 595.09 feet to a one-half inch iron pipe; thence South 13°37' East, 366.09 feet to a one-half inch iron pipe; thence South 76°23' West, 595.09 feet to the POINT OF BEGINNING;

See Weeks Affidavit in Support of Motion for Summary Judgment. Exhibits P through T. This parcel of property is identified by the tax assessor's office on its maps as tax parcel 6400.

4. The relevant portions of the chain of title of the Capstar parcel are as follows: Pike W. Reynolds and Agnes E. Reynolds, husband and wife, owned the Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho (parent parcel) from which the Capstar parcel was later segregated. Reynolds transferred the parent parcel to Edward P. Raden and Colleen L. Raden, husband and wife, and Harold F. Marcoe and Viola G. Marcoe, husband and wife. Radens and Marcoes transferred the parent parcel to Harold A. Funk and Marlene A. Funk, husband and wife. Funks segregated and transferred the Capstar parcel to Kootenai Broadcasting, Inc., an Idaho corporation. Kootenai Broadcasting, Inc. then transferred the Capstar parcel to Rook Broadcasting of Idaho, Inc. Rook Broadcasting subsequently transferred the Capstar parcel to AGM-Nevada, L.L.C., a Nevada Limited Liability Company ("AGM"). AGM then transferred the parcel to Capstar. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibits A through D and P through T.

5. Both the Capstar parcel and the Lawrence parcel were held in unity of title until they were segregated by Harold and Marlene Funk. *See* Weeks Affidavit.

6. A private road traverses the Lawrence parcel in the Southeast Quarter of Section 21. (Answer to Complaint ¶5). A survey of this road as it crosses the Lawrence parcel was recorded June 15, 1998 and placed the portion of the private easement road in the Southeast Quarter of Section 21 as lying within Tax Parcel No. 21-8500. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit W. The parcel over which this surveyed road is now identified as Kootenai County Tax Parcel No. 50N05W-21-9000 because it was segregated from Tax Parcel No. 21-8500 in 1999 after the survey was recorded. This parcel continues to be owned by Lawrences. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibits O, X and Z.

7. In October 1966, General Telephone Corporation ("GTC") acquired a parcel of property from Reynolds located in the Southwest Quarter of Section 22, Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho. The deed granting the parcel in Section 22 to GTC also included an access easement over the Southeast Quarter of Section 21 (the Lawrence Parcel) and the Southwest Quarter of Section 22, Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibits U and Exhibit CC, Wenker Affidavit. In July 1966, GTC obtained a Right of Way Easement over the Southwest Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho for access to its equipment situated on Blossom Mountain. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit V. In

August 1966, GTC obtained a Right of Way Easement over the North Half of the Northeast Quarter of Section 28, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit W.

8. In 1967, GTC had a detail of the access road prepared by an engineer, together with details of its communication facility. The detail of the access road showed the private easement road as leaving the county road, traversing southeast through the Southwest Quarter Section of 21, then entering into the North Half of Section 28 where it traveled southeast for a distance in Section 28 and then turned northeast for the remainder of the distance, then entering the Southeast Quarter of Section 21 and traversing northeasterly through the Lawrence parcel and continuing northeasterly through the Southwest Quarter of Section 22. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit V. GTC's detail map shows the road in the same location as it existed and was used by Funk during his ownership, and as it existed and was used by Rook during Kootenai Broadcasting, Inc.'s ownership. *See* Funk Affidavit and Rook Affidavit.

9. The private road used by GTC, Funk and Rook was the only existing road that provided access to the parcels at the time that Funks purchased the property. *See* Funk Affidavit.

10. In July 1975, Funks sold the Southeast ¼ of the Southeast ¼ of Section 21, Township 50 North, Range 5 West Boise Meridian to Human Synergistics, Inc. At the time of the sale, Funks continued to own the property located in the Southwest Quarter of Section 22. When the sales agreement was drafted, it included a clause to address Funks' access across the Section 21 parcel being sold to allow continued access to their property in Section 22. Item 5 of

the agreement indicated that the Section 21 parcel being sold was subject to an ingress egress easement in favor of the property still held by Funks over the existing road on the property that was being sold to Human Synergistics. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit E. It was not Funks' intent to land lock their Section 22 property upon the sale of the Section 21 property. It was Funks' intent to assure that they retained an easement over the existing road located in the Southeast Quarter of Section 21 for ingress and egress to the property they continued to own in Section 22. *See* Funk Affidavit. Funk continued to use the private road for ingress and egress to Section 22 after the sale of the Section 21 property. *See* Funk Affidavit.

11. In 1989, Funks sold a parcel of property to Capstar's predecessor of record, Kootenai Broadcasting, Inc. At the time of the sale, the only ingress and egress to the parcel was by way of the private road that crossed the Southeast Quarter of Section 21. *See* Rook Affidavit.

12. In 1996, Lawrences' immediate predecessors in title, Arman and Mary Jane Farmanian, granted a written easement in favor of John Mack over the private easement for ingress and egress to his lands located in the Southwest Quarter of Section 22, which he obtained from Harold and Marlene Funk. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit "BB". In granting this easement, Farmanians recognized this private road as the "historic access" for Mack and his predecessors in interest used for access to their parcel in Section 22. Mack's predecessors in interest were the Funks. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibit II.

13. The easement road was in view at the time Lawrences purchased their property. *See* Weeks Affidavit in Support of Motion for Summary Judgment, Exhibits GG and HH.

II. SUMMARY JUDGMENT STANDARDS

The law is well established in Idaho that on a motion for summary judgment, the trial court must determine whether the pleadings, deposition, and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876,878 (1991). The burden of proving the absence of an issue of material fact rests at all times upon the moving party. *McCoy v. Lyons*, 120 Idaho 765, 769,820 P.2d 360,364 (1991); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851,854 (1991).

In *J.R. Simplot Co. v. Bosen*, ___ Idaho ___, ___ P.3d ___ (S.Ct. Opinion 31706, 2006), the court set forth the requirement when the case is a court trial:

> "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.*

III. BACKGROUND

As noted above, a private easement road has existed since at least 1966 which traversed portions of Sections 21, 22 and 28 to access property in the Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. This case arises from a dispute regarding the right of Capstar to use the private easement road to access its

property in the Southwest Quarter of Section 22 (Section 22 parcel) as it traverses the property in the Southwest Quarter of Section 21 (Section 21 parcel) owned by the Lawrences.

Both the Capstar Section 22 parcel and the Lawrence Section 21 parcel were once part of a larger tract held under one common ownership prior to a division of the parcels by the Funks. A private road existed which provided access to both parcels. Although its origin is unknown, it is apparent that GTC obtained an easement over the road as early as 1966. Prior to the separation by Funks of the Lawrences' Section 21 parcel from the parent parcel, the private road across the Section 21 parcel had been used by Funks as the exclusive means to access their property in Section 21 and Section 22. Even after the separation of the Section 21 parcel, Funks continued to use the private easement road to access their Section 22 parcel, and it was later used by Kootenai Broadcasting, Inc. for access to its segregated parcel in Section 22.

IV. ARGUMENT

A. Easement by Implication

An easement can be formed by implication from prior use. In order to establish an easement by implication from prior use, the party trying to establish such an easement must demonstrate (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Bear Island Water Assn. v. Brown*, 125 Idaho 717, 725,874 P.2d 528, 536 (1994); *Cardwell v. Smith*, 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct.App. 1983); *Close v. Rensink*, 95 Idaho 72, 76, 501 P.2d 1383, 1387 (1972); *Davis v. Gowen*, 83 Idaho 204,210,360 P.2d 403,406-407 (1961). Apparent continuous use refers to the use before the separation of the parcels that would indicate the roadway was intended to provide

permanent access to the parcels. *Cardwell v. Smith, supra*, at 78,665 P.2d at 1088. Strict necessity is not required for the creation of an implied easement by prior use. All that is required is reasonable necessity. *Thomas v. Madsen,* 142 Idaho 635, 132 P.3d 392 (2006). The party seeking to establish the easement has the burden of providing the facts to establish the easement. *Id.* at 77, 665 P.2d at 1087.

In its later pronouncements, the Idaho Supreme Court expanded the law on easements by implication in *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999). In Davis, the plaintiffs (Davis) sought to protect an easement over the property of defendant (Peacock). The parties' predecessors in interest established an easement by reservation to protect access to what later became the Davis parcel, over and across the Peacock parcel. The road was the only usable means of access to the Davis parcel until the Davis's constructed another road along the south side of their property, also providing access. The Peacocks then blocked the original road, and Davis brought a quiet title action to establish an easement by implication across the original road. The trial court held that an easement by implications existed and the Idaho Supreme Court upheld the ruling.

The Idaho Supreme Court in reaching its decision first held that the successors in interest to the original grantors of property could assert easement rights by implied or prior use. The court noted:

> [W]e believe there is no equitable reason for the distinction between grantors and grantees in the area of implied easements by prior use. One of the requirements for establishing an implied easement by prior use is that there has been open and continuous use of the easement prior to the severance of the dominant and servient estates. This requirement ensures that the buyer of the servient property will have notice of the preexisting use. Consequently, it is equitable to impose an easement on a buyer who already had notice of its existence. Therefore, we hold

> that a successor in interest to the original grantor of the servient property can claim an implied easement by prior use.

Davis, 133 Idaho at 641-42,991 P.2d at 366-367. The court also reaffirmed that an implied easement by prior use does not require strict necessity, but rather, only reasonable necessity. The court noted:

> Peacock argues that the Russells also had access to their residence because the land they owned was bordered by Idaho Street on the west. He contends that, because the Russell property was not landlocked, there was always access to the residence across their own property. Therefore, use of the disputed road was neither necessary, nor provided the only usable means of access to the residence. Peacock's argument would be persuasive if strict necessity were required for an implied easement by prior use. However, **as our cases have made clear, reasonable necessity is something less than the great present necessity required for an easement implied by necessity**. *See Bear Island Water Ass 'n*, 125 Idaho at 725,874 P.2d 536. In *Bear Island Water Ass 'n*, we held that no implied easement by prior use or necessity had been created. Id However, in so holding, we stated that the establishment of an easement by necessity required an "even weightier showing of a great present necessity for the easement," as compared to the reasonable necessity required for an easement by prior use. *Id.*

Id, 133 Idaho at 642, 992 P.2d 15 367 (emphasis added). Finally, the court in Davis stated that an easement by implication is not extinguished even if the necessity no longer exists. In discussing this issue, the court held as follows:

> While this issue has not been previously addressed by our Court, it appears the well-established rule is that, unlike an easement by way of necessity, an implied easement by prior use is not later extinguished if the easement is no longer reasonably necessary.
>
> This long standing rule is based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained. Consequently, an easement implied by prior use is a true easement of a permanent duration, rather than a temporary easement which exists only as long as the necessity continues. See, e.g., *Norken v. McGahan*, 823 P.2d 622,631 (Alaska 1991); *Thompson v. Schuh*, 593 P.2d 1138, 1145 (Oregon 1979); *Story v. Hefner*, 540 P.2d 562, 566 (Okla. 1975). Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates. See *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958); I.C. § 55-603

> (stating that a transfer of real property also includes all easements attached to the property).
>
> Applying these rules to the facts of this case, we agree with the district court that because use of the road was reasonably necessary for the beneficial use of the Davises' property at the time of severance, an implied easement by prior use arose at that time. Because that implied easement is not extinguished by the end of the necessity, the easement became appurtenant to the land and was subsequently transferred to the Davises at the time they purchased their property.

Id, 133 Idaho a5 643, 992 P.2d at 368.

In the present case, there was unity of title at the time of the severance of the dominant and servient estate. The road was in use by the Funks prior to the severance and was their sole access to both the Section 21 and Section 22 properties. It was their intent after the severance to continue to use the road as their access. Thus, use of the easement was reasonably necessary for the beneficial use of the dominant estate (Section 22 property) at the time of the severance. Given these elements, there was an implied easement by prior use which is appurtenant to the Capstar parcel.

B. Prescriptive Easement

The law of prescriptive easements was reiterated by the Court in *Akers v. D.L. White Construction, Inc.* 142 Idaho 293, 303, 127 P.3d 196, 206 (2005), wherein the court noted:

> A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." (Cite omitted.) The statutory period in question is five years. (Cites omitted.) A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use." (Cite omitted.). Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the

> presumption that the use was adverse and under a claim of right. (Cites omitted.) The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. (Cites omitted.) The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use.

In *Cardenas v. Kurpjuweit,* 114 Idaho 79, 83, 753 P.2d 290, 294 (1988), the Supreme Court held:

> A "claim of right" signifies use without recognition of the rights of the servient estate's owner.(Cite omitted.). The general rule is that proof of open, notorious, continuous and uninterrupted use for the statutory period raises the rebuttable presumption that the use was adverse and under a claim of right. (Cite omitted.) Nonetheless, as stated in *Simmons*: "The use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor."

When the road providing access to the Funks' Section 21 and Section 22 parcels was established is unknown. It is known that it was there as early as 1966. It is undisputed that Funks were using the road for access to both their Section 21 parcel and their Section 22 parcel prior to segregating the parcels. When Funks sold the Section 21 parcel to Human Synergistics, they included in the sales contract language that gave notice that they intended to continue to use the road for ingress and egress to their retained Section 22 parcel. This language provided notice they were claiming a right to use the road in the future for ingress and egress to their retained lands. It is undisputed that Funks and their predecessors then proceeded to use the road openly, continuously, without interruption, under a claim of right for the statutory period. Farmanians (a predecessor of Lawrence) granted an express easement for ingress/egress to a portion of Section 22 to Funks' predecessor, Mack, recognizing Mack had a right to the easement because it was the historical access to Section 22. Thus, there is also a prescriptive easement across this road.

C. Easement by Necessity

An easement by necessity has some similar elements to an easement by prior use. The Court in *B&J Development & Inv., Inc. v. Parsons*, 126 Idaho 504, 887 P.2d 49 (Ct.App. 1994) noted:

> To establish an easement by necessity, the claimant must prove the following elements: (1) that the dominant parcel and the servient parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servient estate *existed at the time of the severance*; and (3) the present necessity for the claimed easement is great. *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct.App. 1987) (emphasis added). An easement by necessity is a creature of public policy. *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 543, 681 P.2d 1010,1018 (CtApp. 1984). Therefore, the easement does not depend on an express mutual agreement. Rather, it arises, and will be recognized, when the three required elements have been established. Establishment of an easement by necessity is not defeated by a contrary expectation harbored by one of the parties. *MacCaskill*, 112 Idaho at 1119, 739 P.2d at 418. It is a question of law. An owner of property, however, cannot create the necessity by his or her own actions. *Cardwell v. Smith*, 105 Idaho 71, 80, 665 P.2d 1081, 1090 (Ct.App. 1983).

In the present case, the dominant parcel and the servient parcel were once part of a larger tract under common ownership. At the time of the severance, the necessity for the easement across the Lawrence parcel existed. This necessity continues today as no other method of road access exists to the parcel. Therefore, the elements of an easement by necessity exists.

V. CONCLUSION

For the foregoing reasons and under the foregoing legal theories, the Court should grant Plaintiff's motion for summary judgment quieting title to the easement to plaintiffs and issue a permanent injunction prohibiting Defendants from further blocking Plaintiff's access.

DATED this 14th day of May, 2007.

JAMES, VERNON & WEEKS, P.A.

BY: Susan P. Weeks
SUSAN P. WEEKS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	U.S. Mail	☐	Overnight Mail
☑	Hand Delivered	☐	Telecopy (FAX)

John P. Whelan
213 4th Street
Coeur d'Alene, ID 83816

Susan P. Weeks

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2007 MAY 31 AM 8:19

CLERK DISTRICT COURT
DEPUTY

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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

MOTION FOR ENLARGEMENT

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: JOHN T. MITCHELL

COMES NOW the Defendants, Douglas Lawrence and Brenda Lawrence, by and through their counsel of record, John P. Whelan, and hereby motions this court, pursuant to Rules 6(b) and 56(c) and 56(f) of the Idaho Rules of Civil Procedure, for an extension of time in which to file their opposition in response to Plaintiff's motion for summary judgment. Defendants request to file their

response on or after August 15, 2007. The affidavits of John P. Whelan, Douglas Lawrence and John Mack are offered in support of this motion. Defendant's request oral argument.

This motion is made on the grounds that Defendant's have not had the opportunity to discover the whereabouts of the various witnesses whose affidavits are relied upon by Plaintiff. Defendants intend to depose each and every witness who has filed an affidavit for Plaintiff. This motion is made on the further ground that Capstar's counsel only yesterday advised Defendant's that it also scheduled a Motion for Summary Judgment for the date of June 13, 2007. It had given previous notice that only an order shortening time was to be heard. Additionally, Plaintiff has failed to identify what documents it relies upon in seeking its Motion for Summary Judgment. Consequently, Defendant's counsel has had to review thousands of pages of the files pertaining to this matter in an effort to determine what issues must be addressed in the opposition to the Motion for Summary Judgment. Lastly, no notice was given by Plaintiff's counsel that she intended to renew her Motion for Summary Judgment .

DATED this 30 day of May, 2007.

JOHN P. WHELAN, P.C.

By: John P. Whelan
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of May, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
✓ Facsimile: (208) 664-1684

John P. Whelan

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
DEPUTY

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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-07671

AFFIDAVIT OF DOUGLAS LAWRENCE

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, Douglas P. Lawrence, after being duly sworn upon my oath, depose and say:

1. I make this Affidavit of my own personal knowledge. I am over the age of 18. I am knowledgeable of the facts and issues regarding this matter and am competent to testify to the facts contained in this affidavit. It is true and correct to the best of my knowledge.

2. In July 1996, my wife and I entered into a sale agreement to purchase 80 acres in the Southeast Quarter of Section 21, Township 50 North, Range 5 West from Arman and Mary Jane Farmanian. We have owned this parcel of land for over 10 years now and have been in litigation over the use of our private road for nearly 9 years. I have studied the history of this road thoroughly and can speak with some authority on the matter.

3. In October of 1998, I called Harold Funk on the telephone. I called him to clarify my understanding of the language that was contained in the Sales Agreement between the Funks and Human Synergistics; the same language the Plaintiff Capstar claims was a reservation of an easement. In a follow-up letter that Harold Funk mailed to me in November 1998, Mr. Funk reassured me that the language was not a reservation. But rather, it was merely to except, from title, an easement that was previously granted to GTE. SEE ATTACHED.

4. In March of 2004, Mr. Funk gave the plaintiff Capstar an affidavit, which the plaintiff now relies on to support a motion of summary judgment, in which Mr. Funk makes a direct contradiction to the signed writing I have from him. Contrary to his writing to me, Mr. Funk now claims in his affidavit that the language in the sale agreement amounts to a reservation. In light of Mr. Funk contradictions, I believe the Court should impeach any testimony coming from Mr. Funk.

5. Also in his affidavit, Mr. Funk claims that Mellick Road did not provide access to the Southwest Quarter of Section 22 or the Southeast quarter of Section 21. This statement is just false. My wife and I have, on several occasions dating as early as 1996, driven our vehicle all the way from our property in Section 21 to Mellick road.

6. Also in his affidavit, Mr. Funk claims that had he not reserved an easement across the now Lawrence parcel, that his land in Section 22 would have been landlocked. Mr. Funk knows this statement to be false as well. In order for Mr. Funk to have a legal easement to his land in Section 22 (through the now Lawrence parcel), the Funks would have need an easement across the

Northeast Quarter of Section 28. The Funks never obtained a legal access across parcel that precedes the Lawrence parcel traveling from Signal Point Road and therefore his land is Section 22 was landlocked irrespective of the Lawrence parcel. The Funks as grantors could never convey a legal access from Signal Point road because they never obtained a legal access.

7. Also in his affidavit, paragraph 9, Mr. Funk states: "*At the time of the sale in 1976 to Rassmussen and Chamberlain, access to the parcel was by use of the same private road that had been continuously used since we first purchased the property.*" I take issue to this statement on this point. In an affidavit Harold Funk gave to the Kootenai Electric Cooperative in February 2001, he states "*We (Harold & Marlene) resided in Kootenai County, Idaho from 1967 until Harold Funk moved in the fall of 1975 and Marlene Funk moved in 1976 after we sold our house.*"Clearly, if Mr. Funk moved to American Falls in 1975, he wasn't continuously using the access road across the Lawrence parcel. I think its save to say that Mr. Funk's use of the access road probably did not extend beyond 1975. If he did use it past 1975, the use was infrequent at best. Certainly, it was not continuous as he would have this Court believe.

8. Access to my property, is controlled by three gates. The first gate is located at the end of the county maintained portion of Signal Point road. The gate was erected in December 1995 and has been locked continuously since that time. Another gate is located on Wilber Mead's property and was locked from 1966 through 1998. In 1998 Wilber Mead removed the lock at which time I placed a lock on my gate. My gate has been continuously locked since 1998.

9. In 1997 I entered into a License Agreement with Nextel Corporation, the predecessor in interest to Tower Asset. Through this License Agreement, Nextel and their successors pay me a monthly rental fee to ingress/egress across my land to get to their tower site. They have continued to pay me this rental fee since the License began in 1997.

10. Sometime after 1998, I met with Clear Channel Management (Capstar). They informed me that they no longer operate any equipment from their site on Blossom Mountain, but rather rent out the tower facility to other tenants.

11. Sometime after my meeting with Clear Channel, I did enter into a License agreement with one of Clear Channel's tenants, Great Northern Broadcasting. This license agreement was similar to the Nextel Agreement in

that they paid me for access across my road. Great Northern Broadcasting honored this agreement until sometime around the time Capstar filed suit against us; at which time Capstar was able to get a Temporary Restraining Order against us and we had to give them a key to our gate.

DATED this 30th day of May, 2007.

Douglas P. Lawrence

SUBSCRIBED AND SWORN to before me this 30th day of May, 2007

JOHN P. WHELAN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Wallace
Commission expires 2/14/08

DOUGLAS P. AND BRENDA J. LAWRENCE
PO Box 1027
Coeur d'Alene, ID 83816-1027
phone: (208) 665-2030
email: lrm004@nidlink.com

Thursday, November 5, 1998

Mr. Harold Funk
865 Fillmore
American Falls, Idaho 83211

Reference: Blossom Mountain - SE section 21

Dear Harold:

I want to thank you for taking the time last week in helping me understand the language contained in the Sales Agreement between you and Human Synergistics. It is somewhat ambiguous and your help is very much appreciated.

I have attached a copy of the Sales Agreement for your review and recollection. Unfortunately, the reproduction quality is not very good and it's hard to read. So to help the matter, I have retyped the paragraph in question (left column) and have typed the explanation as I understand it to be (right column).

Language in question	**Clarification**
Subject to and including an ingress egress easement over this and adjoining property in said sections 21 and 22 owned by the grantor	→ In October 1966, Pike Reynolds sold a 1 acre parcel to GTE in the SW Section 22. Pike deeded to GTE an easement for ingress/egress across the SE Section 21 and the SW section 22 of which this property became subject to.
and including an ingress egress easement over portions of Section 21 heretofore granted to the grantor. Said easement shall be over existing roads until such time as all record owners shall agree to the relocation, improvement and/or abandonment of all or any portions of any roads. This easement is also over similar lands in Section 15.	→ In November 1972, Harold Funk purchased an ingress/egress easement from Wilber Mead across the SW section 21 for the benefit of the lands owned by Harold Funk in Sections 21, 22, and 15. This easement is to run with the existing roads until all owners agree otherwise.
I have reviewed this document and agree with the clarification.	Mr. Harold Funk Date

Mr. Funk, if I have the correct understanding of this language, would you please sign and return this document to me at your earliest convenience. Also, please feel free to add any thoughts you feel applicable. Thank you so much for your help in this matter. A copy has been included for your records.

Sincerely,

Douglas Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of May, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
✓ Facsimile: (208) 664-1684

John P. Whelan

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
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Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

AFFIDAVIT OF JOHN P. WHELAN

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could

competently testify. This affidavit is filed in support of Defendants' motion for enlargement.

2. The Defendants have not had the opportunity to gather the affidavits and deposition testimony needed to oppose Plaintiff's motion for summary judgment. It is the intent of Defendants to take the deposition of each witness who has filed an affidavit for Plaintiffs in this action. Unfortunately, the witnesses are scattered across the United States and Defendants have not been able to track down each witness, much less take their depositions. So additional time is needed to oppose the Plaintiff's motion for summary judgment. I would estimate that an additional sixty (60) days from the date scheduled for the motions (June 13, 2007) would be sufficient.

3. The motion for enlargement on behalf of Defendants is made on the additional ground that, in the case of Capstar, Plaintiff only noticed-up its Motion for Summary Judgment yesterday, as it had previously scheduled only a motion shortening time for June 13, 2007. Additionally, the Plaintiff has failed to last or articulate which part of the Court records is being relied upon for the facts in support of its motion. I am therefore forced to search through thousands of pages of my files pertaining to this matter to determine what issues must be addressed. Moreover, Plaintiff's counsel did not give any advance notice of her intent to pursue two separate motions for summary judgment.

DATED this 30 day of May, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 30 day of May, 2007.

JESSICA IVRDY NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of May, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: _____ U.S. Mail, postage prepaid
✓ Facsimile: (208) 664-1684

John P. Whelan

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
1875 N. Lakewood Dr, Ste. 200
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
ISB #4255

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	Case No. CV 02-7671 MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF DOUGLAS LAWRENCE FILED 5/30/07 NOTICE OF HEARING: June 13, 2007 Time: 3:00 p.m. Judge: John T. Mitchell

COMES NOW Plaintiff and pursuant to Rule 56 (e) and Rule 7 (b)(3)(B), Idaho Rules of Civil Procedure, hereby moves to strike portions of the affidavit of Douglas Lawrence for the reasons enumerated herein. Regarding affidavits submitted in support of summary judgment, *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct.App. 2005) discussed the requirement that evidence submitted by affidavit must be admissible to be considered by the court. Therein the court noted:

Posey argues that nearly the entire affidavit is inadmissible because it does not show that the matters averred to are based on personal knowledge, contains conclusory assertions, contains inadmissible hearsay and provides no foundation for introduction of attached exhibits. Posey's position is well taken.

Affidavits supporting or opposing a summary judgment motion must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated. Idaho Rule of Civil Procedure 56(e). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." (Cites omitted.)

The *Posey v. Ford Motor Credit Co.* court further noted:

Eight documents are attached to the affidavit. No foundation is provided concerning who prepared the documents, several of which, on their face, indicate that they were not prepared by Ford but by the Caldwell dealership. The affidavit purports to identify the documents without demonstration of the requisite personal knowledge for authentication of the documents pursuant to I.R.E. 901 and includes arguments as to the documents' legal effect, none of which is admissible. (Cite omitted.) To the extent that the documents are offered to show the truth of assertions contained within them, the documents are hearsay for which no hearsay rule exception has been established by the Griffith affidavit. In *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct.App. 2004), we described the foundational requirements for application of I.R.E. 803(6), the exception to the hearsay rule for business records:

> Rule 803(6), the business record exception to the hearsay rule, allows admission of a record or report if it was made and kept in the course of a regularly conducted business activity and if it was the regular practice of that business to make the report or record. *See Henderson v. Smith*, 128 Idaho 444, 450, 915 P.2d 6, 12 (1996); *In the Interest of S.W.*, 127 Idaho 513, 520, 903 P.2d 102, 109 (Ct.App. 1995). These foundational requirements must be shown through "the testimony of the custodian or other qualified witness." I.R.E. 803(6). That is, the record must be authenticated by someone "who has custody of the record as a regular part of his or her work or who has supervision of its creation." *Henderson*, 128 Idaho at 450, 915 P.2d at 12. A document is not admissible under I.R.E. 803(6) unless the person testifying has a personal knowledge of the record-keeping system used by the business which created the document. *Id.*; *Herrick v. Leuzinger*, 127 Idaho 293, 297, 900 P.2d 201, 205 (Ct.App. 1995).

Hill, 140 Idaho at 628, 97 P.3d at 1017. The mere receipt and retention by a business entity of a document that was created elsewhere does not transform the document into a business record of the receiving entity for purposes of I.R.E. 803(6). Id.; *In the Interest of S.W.*, 127 Idaho 513, 520, 903 P.2d 102, 109 (Ct.App. 1995). Griffith's affidavit does not comply with the requirements of Rule 803(6) with respect to any of the records attached to his affidavit.

Posey at 483-484.

The following portions of Mr. Lawrence's affidavit should be stricken:

1. Paragraph 3 of Mr. Lawrence's affidavit contains inadmissible hearsay and should be stricken.

2. Paragraph 6 presents argument, and should be stricken.

3. Paragraph 7 presents argument and should be stricken.

4. Paragraph 8 contains inadmissible hearsay and should be stricken.

DATED this 6th day of June, 2007.

JAMES, VERNON & WEEKS, P.A.

BY: Susan P. Weeks
SUSAN P. WEEKS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☑	U.S. Mail	☐	Overnight Mail
☐	Hand Delivered	☑	Telecopy (FAX)

John P. Whelan
213 4th Street
Coeur d'Alene, ID 83816

Susan D. Weeks

STATE OF IDAHO }SS
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
DEPUTY

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ISB #4255

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	Case No. CV 02-7671 REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant has submitted the Affidavit of Douglas Lawrence, apparently in opposition of the motion. Much of the affidavit is inadmissible. Some of it presents argument. To the extent this affidavit presents argument, it is addressed herein.

Mr. Lawrence apparently requests that this court not give credence to Harold Funk's affidavit because of a letter that Defendants obtained from Mr. Funk in 1998 wherein he indicated his understanding of the terms included in the Sales Agreement. Mr. Lawrence claims

that this letter, prepared by him, is so diametrically opposed to Harold Funk's affidavit that the court should not consider Harold Funk's testimony as credible. The "clarification" portion followed a phone conversation between Mr. Funk and Mr. Lawrence, and without all of the surrounding circumstances of that conversation, it is impossible to understand what Mr. Funk was clarifying for Mr. Lawrence with respect to the language. Mr. Lawrence has known how to contact Mr. Funk since 1998. (In fact, plaintiff's counsel was able to locate Mr. Funk based upon the address provided by this letter.) If he wished to have testimony regarding this issues, he could easily have contacted Mr. Funk. The letter he provides is hearsay, and does not provide impeachment of Mr. Funk's affidavit testimony. Further, Mr. Funk's affidavit testimony is corroborated by Mr.Rook's affidavit testimony.

Next, Mr. Lawrence argues that previous affidavits of Funk submitted in unnamed cases are inconsistent. However, even if one were to believe the unsupported allegations, the affidavits are not inconsistent. Mr. Funk indicated he sold the property in 1976 and that the same prive road that had been continuously used from when they purchased the property was the one in use at that time. In the "other" alleged affidavit, Mr. Funk testified that his family moved to Idaho Falls in 1975-1976. Lawrence argues that if Mr. Funk moved from the area in 1975, his use of the road the last year had to be infrequent at best. This argument misconstrues the affidavit testimony. Mr. Funk did not testify that he used the road continuously only in 1976. He said the road that was the access was the one he had continuously used since he first the property, i.e. the only road he used, and it was on an ongoing basis. Lawrence confuses "continuous" with "frequent.

Defendants have submitted no material fact in dispute. Summary judgment is appropriate.

DATED this 6th day of June, 2007.

JAMES, VERNON & WEEKS, P.A.

BY: Susan P. Weeks
SUSAN P. WEEKS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☑	U.S. Mail	☐	Overnight Mail
☐	Hand Delivered	☑	Telecopy (FAX)

John P. Whelan
213 4th Street
Coeur d'Alene, ID 83816

Susan P. Weeks

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
NL
2007 JUN -7 PM 2:53
CLERK DISTRICT COURT
DEPUTY

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
1875 N. Lakewood Dr, Ste. 200
Coeur d'Alene, ID 83814
Telephone: (208) 667-0685
Facsimile: (208) 664-1684
ISB #4255

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	Case No. CV 02-7671 MOTION TO STRIKE PORTIONS OF AFFIDAVIT OF JOHN MACK FILED 5/30/07 NOTICE OF HEARING: June 13, 2007 Time: 3:00 p.m.

COMES NOW Plaintiff and pursuant to Rule 56 (e) and Rule 7 (b)(3)(B), Idaho Rules of Civil Procedure, hereby moves to strike portions of the affidavit of John Mack for the reasons enumerated herein. Regarding affidavits submitted in support of summary judgment, *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct.App. 2005) discussed the requirement that evidence submitted by affidavit must be admissible to be considered by the court. Therein the court noted:

> Posey argues that nearly the entire affidavit is inadmissible because it does not show that the matters averred to are based on personal knowledge, contains

conclusory assertions, contains inadmissible hearsay and provides no foundation for introduction of attached exhibits. Posey's position is well taken.

Affidavits supporting or opposing a summary judgment motion must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated. Idaho Rule of Civil Procedure 56(e). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." (Cites omitted.)

The *Posey v. Ford Motor Credit Co.* court further noted:

Eight documents are attached to the affidavit. No foundation is provided concerning who prepared the documents, several of which, on their face, indicate that they were not prepared by Ford but by the Caldwell dealership. The affidavit purports to identify the documents without demonstration of the requisite personal knowledge for authentication of the documents pursuant to I.R.E. 901 and includes arguments as to the documents' legal effect, none of which is admissible. (Cite omitted.) To the extent that the documents are offered to show the truth of assertions contained within them, the documents are hearsay for which no hearsay rule exception has been established by the Griffith affidavit. In *State v. Hill*, 140 Idaho 625, 97 P.3d 1014 (Ct.App. 2004), we described the foundational requirements for application of I.R.E. 803(6), the exception to the hearsay rule for business records:

> Rule 803(6), the business record exception to the hearsay rule, allows admission of a record or report if it was made and kept in the course of a regularly conducted business activity and if it was the regular practice of that business to make the report or record. *See Henderson v. Smith*, 128 Idaho 444, 450, 915 P.2d 6, 12 (1996); *In the Interest of S.W.*, 127 Idaho 513, 520, 903 P.2d 102, 109 (Ct.App. 1995). These foundational requirements must be shown through "the testimony of the custodian or other qualified witness." I.R.E. 803(6). That is, the record must be authenticated by someone "who has custody of the record as a regular part of his or her work or who has supervision of its creation." *Henderson*, 128 Idaho at 450, 915 P.2d at 12. A document is not admissible under I.R.E. 803(6) unless the person testifying has a personal knowledge of the record-keeping system used by the business which created the document. *Id.*; *Herrick v. Leuzinger*, 127 Idaho 293, 297, 900 P.2d 201, 205 (Ct.App. 1995).

Hill, 140 Idaho at 628, 97 P.3d at 1017. The mere receipt and retention by a business entity of a document that was created elsewhere does not transform the document into a business record

> of the receiving entity for purposes of I.R.E. 803(6). Id.; *In the Interest of S.W.*, 127 Idaho 513, 520, 903 P.2d 102, 109 (Ct.App. 1995). Griffith's affidavit does not comply with the requirements of Rule 803(6) with respect to any of the records attached to his affidavit.
>
> *Posey* at 483-484.

Mr. Mack indicates in his affidavit that he has owned his property since 1992 and has used and improved a private access road from the termination of Mellick Road into the Section 22 property he owns, which surrounds the Plaintiff's property. Mr. Mack claims that he "takes issue" with Harold Funk's affidavit testimony because in 1969 Mellick Road extended to property owned by Mr. Funk in Section 15. Mr. Mack postulates without foundation or evidence to support his supposition that Mr. Funk's property connected the private access road that he now uses to access his property in Section 22. Therefore, that portion of John Mack's testimony should be stricken and not considered for the motion for enlargement. Further, if it was Defendants' intent to present this evidence as raising a question of fact in opposition to the motion for summary judgment, it should be stricken and not considered.

DATED this 7th day of June, 2007.

JAMES, VERNON & WEEKS, P.A.

BY: Susan P. Weeks
SUSAN P. WEEKS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	U.S. Mail	☐	Overnight Mail
☐	Hand Delivered	☑	Telecopy (FAX)

John P. Whelan
213 4th Street
Coeur d'Alene, ID 83816

Susan P. Weeks

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED

2007 JUN -6 AM 8:59

CLERK DISTRICT COURT
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

MOTION FOR DISQUALIFICATION FOR CAUSE

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: JOHN T. MITCHELL

COMES NOW the Defendants, Douglas Lawrence and Brenda Lawrence, by and through their attorney of record, John P. Whelan, and hereby motions this court for an Order for Disqualification for Cause against the Honorable John T. Mitchell, presiding judge in the above-entitled action. This motion is made on

the ground that Defendants believe the Honorable John T. Mitchell is biased or prejudiced against them or their case in this action. This motion is made on the ground of Idaho Rule of Civil Procedure Rule 40(d)(2).

Defendants request oral argument.

DATED this 5th day of June, 2007.

Respectfully Submitted,

John P. Whelan

Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
✓ Facsimile: (208) 664-1684

John P. Whelan

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2007 JUN -6 AM 8:54

CLERK DISTRICT COURT
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

APPLICATION FOR ORDER SHORTENING TIME

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: John T. Mitchell

COMES NOW, the attorney for the above-named Defendants, John P. Whelan, and respectfully moves the Court for an order that the time required for service of the Motion for Disqualification for Cause be shortened so that this

52

matter can be heard on the 13th day of June, 2007, at 3:00 o'clock p.m., before the Honorable John T. Mitchell.

This Motion is made for the reason and upon the grounds that there is not sufficient time to give statutory notice. Plaintiff will not be disadvantaged in any fashion, and further, it would be in the interest of justice.

PLEASE TAKE NOTICE that John P. Whelan will present oral argument and evidence at this hearing.

DATED this 5th day of June, 2007.

Respectfully Submitted,

John P. Whelan

John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: _____ U.S. Mail, postage prepaid
_✓_ Facsimile: (208) 664-1684

John P. Whelan

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2007 JUN -6 AM 8:54

CLERK DISTRICT COURT
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

AFFIDAVIT OF JOHN P. WHELAN

HEARING DATE: June 13, 2007
TIME: 3:00 p.m.
JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could competently testify.

2. This affidavit is offered in support of the Motion for Disqualification for Cause seeking to disqualify the Honorable John T. Mitchell from presiding any further in the above-entitled action, and also in support of Defendants' application for an order shortening time.

3. When the Honorable John T. Mitchell took the bench in 2001, your affiant was the attorney of record for the Defendant in the case of *Yovichin v. Bush*, CV-2001-2116 (2001). Judge Mitchell took over the role as presiding Judge in that case for the Honorable James Judd when Judge Judd retired. Your affiant believes that Judge Mitchell disqualified himself, pursuant to Rule 40(d)(4), in that case on November 20, 2001 because your affiant was the attorney of record for the Defendants and Judge Mitchell was biased or prejudice against John P. Whelan at that time, as the parties to the action and the counsel for the Plaintiffs (Jerry Trunkenholz) had had no prior dealings with Judge Mitchell before he was assigned to the case. Your affiant believes that Judge Mitchell voluntarily disqualified himself in the case because he had a "personality conflict" with your affiant that biased or prejudiced Judge Mitchell in his handling of that case. A copy of the order of disqualification is attached hereto as Exhibit A.

4. In the case of *Sauls v. Luchi* (CV-04-1616), your affiant was the counsel for the Defendant. The matter was tried as a jury trial. The jury

rendered a defense verdict in that chase which the Honorable John T. Mitchell overturned in part. The portion of the verdict overturned required your affiant's client to pay over an earnest money deposit to the Plaintiffs even though their pleadings made no such request. Your affiant believes that the Court's action was motivated by bias or prejudice against your affiant as the attorney for the Defendant in the action. The Defendant filed his own appeal in that action, the status of which is unknown.

5. In the case of Straub v. Smith, CV-04-5437, your affiant was the attorney for the Defendants. In that case, the Plaintiff dismissed her action one week before a scheduled jury trial. The attorney for the Plaintiff, Scott Poorman, sought and received your affiant's stipulation to have the case dismissed. Your affiant reached no agreement with Mr. Poorman to waive costs and attorney fees. Yet, the order submitted to the Honorable John T. Mitchell by Mr. Poorman contained wording that the parties were to bear their own costs. The proposed order was not sent to your affiant before being submitted to the Court for signing. The Court signed the order as submitted. When the order was served on your affiant after it had been signed, your affiant filed a timely motion for reconsideration. The Honorable John T. Mitchell did not apparently read the motion. The motion was denied. The grounds for denial included the failure to cite a rule of procedure in support of the motion (yet such a rule was referenced in the motion). The claim for costs and attorney fees was denied on the additional ground that the Defendants' pleading did not contain a request for attorney fees (which I.R.C.P. Rule 54(e)(4) specifically states is not necessary). This ground for denial of the motion for reconsideration was not even asserted by Mr. Poorman in his opposition papers to the motion. The Court supplied Mr.

Poorman with his argument. Attorney fees and costs were denied to your affiant and his clients even though the Court admonished Mr. Poorman for perpetrating a fraud on the Court. An appeal was filed by your affiant for the Defendants and the Court of Appeal overturned the trial court's ruling on the matter. The Idaho Supreme Court took the case on review but no decision has been issued on the review. Your affiant believes that the Court's ruling in the *Straub v. Smith* case was motivated by the Court's bias and prejudice against your affiant.

6. In the case of *Capstar v. Lawrence*, CV-02-7671, the Honorable John T. Mitchell granted summary judgment in favor of the Plaintiff, who was Susan Seeks, the partner of Lee James, a friend of the Honorable John T. Mitchell and the current president of the Idaho Trial Lawyers Association. In this case, the Court found that a certain Sale Agreement pertaining to the sale of land was clear and unambiguous. An appeal was taken by the Defendants. The Idaho Supreme Court overturned the grant of summary judgment. Your affiant believes that the result on the appeal has merely increased the bias and prejudice of the Court against your affiant.

7. In the case of *Tower Asset Sub, Inc. v. Lawrence* (CV-03-4621), on the same set of documents found to be clear and unambiguous in the *Capstar* case, the Court found the documents ambiguous. The Court entered summary judgment in favor of Plaintiff in that action. Your affiant believes that the granting of summary judgment in favor of the Plaintiff (who was represented by Ms. Weeks) was motivated by bias and prejudice against your affiant. An appeal was taken to the Idaho Supreme Court and the Court's order was overturned.

Your affiant believes that the results of the appeal in the case has only increased the Court's bias and prejudice against your affiant.

8. In the recent cases of *Krivor v. Rogers* (CV-06-6252) and *Metropolitan Property & Casualty v. Allen* (CV-06-6358), where your affiant represents the Rogers and the Allens, Defendants in the actions, the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point. Your affiant believes the Court has singled out your affiant for treatment that is different from the treatment received by other attorneys appearing before the Honorable John T. Mitchell.

9. Your affiant believes that the bias and prejudice held by the Court against your affiant results in a situation where your affiant's clients do not receive fair and impartial rulings by the Court. Your affiant believes that the bias and prejudice held by the Court against your affiant causes the Court to be biased and prejudiced against the clients of your affiant.

10. Your affiant requests that the Honorable John T. Mitchell disqualify himself from further rulings on the above-entitled matter.

11. Good cause for the granting of Defendants' application for an order shortening time exists in that the date of June 13, 2007 has already been reserved for the hearing of several motions.

DATED this 5th day of June, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 5th day of June, 2007.

JESSICA TVRDY NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ___ U.S. Mail, postage prepaid
___✓___ Facsimile: (208) 664-1684

John P. Whelan

STATE OF IDAHO
County of Kootenai)ss
FILED 11-21-01
AT 2:35 O'Clock P M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MARK DANIEL YOVICHIN,

Plaintiff,

vs.

ROBERT BUSH,

Defendant.

Case No. CV 2001 2116

ORDER OF SELF DISQUALIFICATION

The undersigned having determined that it is appropriate to voluntarily disqualify himself pursuant to *I.R.C.P. 40(d)(4)* or *I.C.R. 25(c)*.

IT IS ORDERED that the undersigned is hereby disqualified and this matter is referred to the administrative judge for re-assignment.

Dated this 20th day of November, 2001.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 21 day of November, 2001 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Jerry Trimkenbolz	769-7200	Hon. Charles Hosack
J. P. Whelan	664-5891	

By Mern Thorne
Mern Thorne, Secretary/Deputy Clerk

Exhibit A

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

ORDER SHORTENING TIME

BASED upon the Motion for Disqualification for Cause and Application for Order Shortening Time filed herein and for good cause appearing, now, therefore,

IT IS HEREBY ORDERED that John P. Whelan's Motion for Disqualification for Cause and Application for Order Shortening Time shall be heard on the 13th day of June, 2007 at 3:00 p.m.

DATED this 13th day of June, 2007.

John T. Mitchell, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of June, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

John P. Whelan
213 N. 4th Street
Coeur d' Alene, ID 83814
Via: ____ U.S. Mail, postage prepaid
X Fax to (208) 664-2240

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814
Via: ____ U.S. Mail, postage prepaid
X Facsimile: (208) 664-1684

CLERK OF THE DISTRICT COURT

By: Diane Clausen
Deputy

S E OF IDAHO)
County of KOOTENAI)ss
FILED 6-25-07
AT 11:30 O'Clock a M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

TOWER ASSET, INC., a Delaware Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2003 4621**

MEMORANDUM DECISION AND ORDER DENYING MOTION FOR DISQUALIFICATION FOR CAUSE, I.R.C.P. 40(d)(2)

CAPSTAR RADIO OPERATING COMPANY, a Delaware Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2002 7671**

MEMORANDUM DECISION AND ORDER DENYING MOTION FOR DISQUALIFICATION FOR CAUSE, I.R.C.P. 40(d)(2)

I. BACKGROUND.

A. *Tower Asset, Inc. v. Lawrence.*

On June 27, 2003, plaintiff Tower Asset, Inc. filed this lawsuit against defendants Lawrence, requesting an easement across defendants Lawrences' land so that Tower Asset could service antennas on land it leased on top of Blossom Mountain. Tower Asset requested a temporary restraining order which was granted on June 24, 2003, ordering Lawrences not to block Tower Asset's access across Blossom Mountain Road,

contingent on Tower Asset posting a $3,000.00 bond. Douglas Lawrence filed a *pro se* appearance on December 5, 2003, and Brenda Lawrence filed a *pro se* appearance on December 18, 2003.

On August 17, 2004, Tower Asset filed its Motion for Summary Judgment. On September 9, 2004, attorney John P. Whelan appeared as counsel for the Lawrences. Oral argument on the summary judgment motion was held November 9, 2004. At the conclusion of that hearing, the Court granted Tower Asset's motion and ordered Tower Asset's counsel to prepare an order. Tower Asset did not prepare a proposed order for quite some time, but on May 27, 2005, this Court entered an "Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title." On July 7, 2005, Lawrences timely filed a Notice of Appeal. On January 26, 2007, the Idaho Supreme Court filed its decision vacating summary judgment and remanding the matter back to this Court. On April 18, 2007, the Remittitur from the Idaho Supreme Court was filed in this case. Two days later, on April 20, 2007, this Court noticed this matter for a status conference to be held on May 14, 2007. Counsel for both sides appeared, and at the conclusion of that hearing, this matter was set for a four day jury trial commencing December 10, 2007. That jury trial was given a first priority setting relative to the *Capstar* case. Also on May 14, 2007, Tower Asset filed its "Renewed Motion for Summary Judgment", and this was discussed at the May 14, 2007, status conference. At that May 14, 2007, hearing, Tower Asset requested a hearing date for their motion for summary judgment and was given the date of June 13, 2007.

On June 5, 2007, John P. Whelan, attorney for defendants Douglas and Brenda Lawrence, filed a "Motion for Disqualification for Cause", an "Affidavit of John P. Whelan" in support of said motion, and a Notice of Hearing on said motion for June 13, 2007. Since such hearing date did not give plaintiff the required fourteen-day notice (I.R.C.P.

7(b)(3)(A)) , an Application for Order Shortening Time was filed. At the June 13, 2007 hearing, the motion to shorten time was granted.

B. ***Capstar Radio Operating Company v. Lawrence.***

On November 7, 2002, plaintiff Capstar Radio Operating Company filed this lawsuit against defendants Lawrence, requesting an easement across defendants Lawrences' land so that Capstar could access the land it owns on top of Blossom Mountain, upon which it has a transmission tower. Capstar requested a temporary restraining order which was granted on November 7, 2002, ordering Lawrences not to block Capstar's access across Blossom Mountain Road, contingent on Capstar posting a $1,000.00 bond. A hearing was held on November 15, 2002, on the preliminary injunction, and Douglas Lawrence and Brenda Lawrence appeared *pro se.* The preliminary injunction order was entered on November 21, 2002. On December 2, 2002, attorney Ian Smith appeared on behalf of Lawrences. On August 26, 2003, Smith filed his motion to withdraw which was rendered moot by the substitution of attorney Sam Eisemann filed on September 5, 2003. Even though he is not an attorney, on November 3, 2003, Douglas Lawrence filed a Notice of Substitution of Counsel for both himself and Brenda Lawrence. On December 5, 2003, Douglas Lawrence filed a notice appearance that he is appearing on behalf of himself only. At a hearing December 11, 2003, Douglas Lawrence appeared, as did Brenda Lawrence. The Court cautioned the Lawrences of the hazards of appearing without counsel, that they would be held to the same standard as an attorney, that Douglas Lawrence could not represent Brenda Lawrence, and required Brenda Lawrence file a written *pro se* appearance if she was going to represent herself. Mediation was ordered to be completed no later than February 28, 2004. Brenda Lawrence filed her appearance on December 18, 2003.

On March 9, 2004, Capstar filed its Motion for Summary Judgment and noticed

that motion for hearing on April 6, 2004, and on March 31, 2004, Capstar noticed that motion for hearing on April 14, 2004. Lawrences appeared pro se at the April 14, 2004, hearing. Partial summary judgment was granted in favor of Capstar against Lawrences on Capstar's express easement theory, and the Court specifically stated Capstar's other theories were not to be considered until Lawrences completed their discovery. On April 16, 2004, Capstar filed its Motion for Order of Entry of Final Judgment on the grounds that since the Court had found an express easement, the other theories were moot. On April 22, 2004, the Lawrences *pro se* filed their Motion for Reconsideration of the Court's Partial Summary Judgment of April 14, 2004, and noticed that matter for hearing on April 29, 2004. Capstar noticed its Motion for Entry of Final Judgment on April 29, 2004, as well. At the conclusion of that hearing, this Court granted Capstar's Motion for Entry of Final Judgment, denied Lawrences' Motion for Reconsideration, and counsel for Capstar was ordered to prepare an order reflecting those rulings. Capstar's counsel failed to do so. The case was inactive for quite some time, and as a result, the Court filed a Notice of Proposed Dismissal on January 24, 2005. On February 10, 2005, attorney John P. Whelan appeared for the Lawrences. An Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title was finally prepared by Capstar's counsel and was signed and entered by the Court on June 7, 2005. On July 7, 2005, on behalf of the Lawrences, Whelan filed a Notice of Appeal.

On January 26, 2007, the Idaho Supreme Court filed its decision vacating summary judgment and remanding the matter back to this Court. On March 30, 2007, the Remittitur from the Idaho Supreme Court was filed in this case. On April 20, 2007, this Court noticed this matter for a status conference to be held on May 14, 2007. Counsel for both sides appeared, and at the conclusion of that hearing this matter was set for a four-day court trial commencing December 10, 2007, set with a second priority to the *Tower*

Asset case. Also on May 14, 2007, Tower Asset filed its "Renewed Motion for Summary Judgment", and this was discussed at the May 14, 2007, status conference. At that May 14, 2007 hearing, Tower Asset requested a hearing date for their motion for summary judgment and was given the date of June 13, 2007.

On June 5, 2007, John P. Whelan, attorney for defendants Douglas and Brenda Lawrence, filed a "Motion for Disqualification for Cause", an "Affidavit of John P. Whelan" in support of said motion, and a Notice of Hearing on said motion for June 13, 2007. Since such hearing date did not give plaintiff the required fourteen-day notice (I.R.C.P. 7(b)(3)(A)), an Application for Order Shortening Time was filed. At the June 13, 2007 hearing, the motion to shorten time was granted.

II. ANALYSIS.

A. Introduction.

The filing of Lawrences' Motion for Disqualification for Cause has the effect of pre-empting the June 13, 2007, hearing on Tower Asset's Renewed Motion for Summary Judgment. That is because "Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification." I.R.C.P. 40(d)(5).

Idaho Rule of Civil Procedure 40(d)(2) requires the "...judge...sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions." Hearing was held on June 13, 2007. This Court appreciates the fact that this is a matter committed to the Court's discretion. *Desfosses v. Desfosses,* 120 Idaho 27, 29-30, 813 P.2d 366, 368-69 (Ct.App. 1991); *Roselle v. Heirs and Devisees of Archie Grover,* 117 Idaho 530, 533, 789 P.2d 526, 529 (Ct.App. 1990).

B. Allegations of Bias and Prejudice Based Upon Past Decisions.

The basis of Whelan's motion is stated in paragraph nine of his affidavit:

> 9. Your affiant believes that the bias and prejudice held by the Court against your affiant results in a situation where your affiant's clients do not receive fair and impartial rulings by the Court. Your affiant believes that the bias and prejudice held by the Court against your affiant causes the Court to be biased and prejudiced against the clients of your affiant.

Affidavit of John P. Whelan, p. 5, ¶ 9. A review of Whelan's affidavit shows he has made specific allegations of "bias and prejudice" by this Court against Whelan, and those concerns must be addressed.

From a temporal standpoint, Mr. Whelan's **first** concern is stated as follows:

> 3. When the Honorable John T. Mitchell took the bench in 2001, your affiant was the attorney of record for the Defendant in the case of *Yovichin v. Bush*, CV-2001-2116 (2001). Judge Mitchell took over the role as presiding judge in that case for the Honorable James Judd when Judge Judd retired. Your affiant believes that judge Mitchell disqualified himself, pursuant to Rule 40(d)(4), in that case on November 20, 2001 because your affiant was the attorney of record for the Defendants and judge Mitchell was biased or prejudice [sic] against John P. Whelan at that time, as the parties to the action and the counsel for the Plaintiffs (Jerry Trunkenholz [sic]) had had no prior dealings with judge Mitchell before he was assigned to the case. Your affiant believes that judge Mitchell voluntarily disqualified himself in the case because he had a "personality conflict" with your affiant that biased or prejudiced judge Mitchell in his handling of that case. A copy of the order for disqualification is attached hereto as Exhibit A.

This Court has reviewed Exhibit A, the Order on Self Disqualification in *Yovichin v. Bush*. From a review of that document, the Court has absolutely no independent recollection as to **why** the Court voluntarily disqualified himself from *Yovichin v. Bush,* Kootenai County Case No. CV 2001 2116. The Order on Self Disqualification was entered November 20, 2001, which was the first day of work for the undersigned as a district judge. The court file in *Yovichin* has been purged. The Court has reviewed what was scanned into court records in that case. Following that review, the Court cannot determine the reason for the disqualification and can only speculate as to two possible reasons.

First, in *Yovichin,* John Beutler and Associates, Inc., and Rafael (Rusty) Reyes

were eventually brought in as third party defendants by defendant Bush. However, from a review of the limited court records it appears that this did not occur until after November 20, 2001. The undersigned would consider Mr. Reyes and Mr. Beutler as friends and would likely not have felt comfortable being assigned to a case where they were parties or potential witnesses. Since the scanned file is incomplete, it is not clear is whether the Court's review of the file on November 20, 2001, would have disclosed that John Beutler or Rusty Reyes were involved in the case.

The second and more likely reason the undersigned disqualified himself in *Yovichin* is as follows: As an attorney, the undersigned can recall being involved in only one lawsuit where Mr. Whelan was the opposing attorney. That case was *In the Matter of the Estate of Dianne Rothe,* Kootenai County Case No. SP 675. That case involved a probate filed by Mr. Whelan on behalf of his client Alvin V. "Butch" Rothe. A review of the court file in that case shows that at the time the undersigned was transitioning from an attorney to a judge, he was still counsel for the Idaho Trial Lawyer's Association, which had been named as a recipient of a foundation named after the decedent's predeceased husband, to be funded from a medical malpractice claim that allegedly resulted in his death. The undersigned became involved in that case on March 22, 2000, and remained involved until just before his investiture as a district judge. On November 16, 2001, four days before becoming district judge, the undersigned signed a Notice of Substitution of Counsel where Leander L. James was substituted as counsel for the Idaho Trial Lawyer's Association. Since *In the Matter of the Estate of Dianne Rothe* was *still pending* at the time of the undersigned's appointment as a district judge, the undersigned would have disqualified himself from *Yovichin* as a matter of course. Upon inheriting Judge Judd's caseload on November 20, 2001, the undersigned disqualified himself from those cases

assigned to Judge Judd in which counsel on those cases were the opposing counsel in cases in which the undersigned was involved as an adversarial opponent at the time of the undersigned's appointment. Self disqualifications in those cases were made to avoid any appearance of bias since just prior to November 21, 2001, the undersigned and one of the counsel in those cases assigned to the undersigned judge were in an adversarial relationship. Those self-disqualifications were only made to cases in which counsel were involved who were opposing adversarial counsel in other cases that were *still pending* which the undersigned was an attorney at the time he became district judge. Those self-disqualifications were made in *several* cases in an effort to avoid the appearance of impropriety that would occur when one day the undersigned was your adversarial opponent in a litigated case, and the next day he was assigned to be the judge in another one of your cases. The passage of time ameliorated that concern.

Again, since the undersigned has no independent recollection as to why he disqualified himself in *Yovichin*, all of the above amounts to conjecture. Mr. Whelan has not stated any reason why he feels this Court would have had a "personality conflict" with Mr. Whelan back on November 21, 2001, so this Court can only speculate. The only reason this Court engages in such speculation is because Mr. Whelan has raised concerns and those concerns must be addressed. The undersigned cannot recall why he disqualified himself in *Yovichin v. Bush*. In spite of the Court's best efforts to determine the reason for the 2001 disqualification in *Yovichin v. Bush*, the fact that the Court cannot recall the reason itself indicates a lack of bias or prejudice. Had bias or prejudice or a "personality conflict" been the reason for that disqualification in 2001, the Court would expect to remember that. It does not.

The undersigned can unequivocally state that he harbors no grudges against Mr.

Whelan at the present, nor did he on November 21, 2001. The undersigned can unequivocally state that he has no bias or prejudice against Mr. Whelan at present, nor did he on November 21, 2001.

If the reason for that self-disqualification in *Yovichin v. Bush* was due to the *still pending* probate or trust litigation, the passage of time eliminates the need to self-disqualify or disqualify for cause due to past adversarial relationships. Within the passage of a year, the undersigned did not disqualify himself from new cases assigned to him, in which counsel were involved which were involved in litigation still *pending* at the time he became a district judge. That fact is borne out by the fact that apparently the next time a case in which Mr. Whelan was involved was assigned to the undersigned was in 2004 in *Sauls v. Luchi,* Kootenai County Case No. CV 2004 1616. That case was filed March 8, 2004, twenty eight months after the undersigned was appointed as a district judge, and at least twenty-eight months distant from any prior dealings with Mr. Whelan as an adversary. Accordingly, there was no self-disqualification in *Sauls v. Luchi.*

Mr. Whelan's next concern is as follows:

> 4. In the case of *Sauls v. Luchi* (CV-04-1616), your affiant was the counsel for the Defendant. The matter was tried as a jury trial. The jury rendered a defense verdict in that chase [sic] which the Honorable John T. Mitchell overturned in part. The portion of the verdict overturned required your affiant's client to pay over an earnest money deposit to the Plaintiffs even though their pleadings made no such request. Your affiant believes that the Court's action was motivated by bias or prejudice against your affiant as the attorney for the Defendant in the action. The Defendant filed his own appeal in that action, the status of which is unknown.

Affidavit of John P. Whelan, pp. 2-3, ¶ 4. This Court's action in that case was simply not in any way "motivated by bias or prejudice against your affiant as the attorney for the Defendant in the action." Mr. Whelan is correct; Mr. Luchi filed his own appeal. A review of the Court file in *Sauls v. Luchi*, which is entirely intact, would have shown Mr. Whelan

that on November 8, 2006, the Idaho Court of Appeals affirmed the undersigned in all respects in 2006 unpublished Opinion No. 715. That decision became final upon April 16, 2007, with the filing of the Remittitur in that case. In any event, the decisions made by the Court in *Sauls v. Luchi* were not made based upon bias or prejudice against Mr. Whelan. They were decisions based upon motions made by opposing counsel Charles Dean. The Court has reviewed its June 17, 2005 "Memorandum Decision and Order on Plaintiffs' Motion for Judgment Not Withstanding the Verdict" in *Sauls v. Luchi.* It is well reasoned. While Luchi filed his own appeal, if Mr. Whelan felt the judge was biased or prejudiced, or off base in its decision, or misunderstood the matter before it, there are mechanisms short of appeal Mr. Whelan could have used to bring that error to the Court's attention. That did not occur. In any contested motion, usually one side wins, one side loses. Sometimes one party wins in part and loses in part. Just because one side wins does not mean the judge's decision was based upon bias or prejudice against the party who lost or their attorney. The undersigned knows such was not the case in *Sauls v. Luchi.*

Next, Mr. Whelan writes in his affidavit;

> 5. In the case of Straub v. Smith, CV-04-5437 (Supreme Court No. 31955), your affiant was the attorney for the Defendants. In that case, the Plaintiff dismissed her action one week before a scheduled jury trial. The attorney for the Plaintiff, Scott Poorman, sought and received your affiant's stipulation to have the case dismissed. Your affiant reached no agreement with Mr. Poorman to waive costs and attorney fees. Yet, the order submitted to the Honorable John T. Mitchell by Mr. Poorman contained wording that the parties were to bear their own costs. The proposed order was not sent to your affiant before being submitted to the Court for signing. The Court signed the order as submitted. When the order was served on your affiant after it had been signed, your affiant filed a timely motion for reconsideration. The Honorable John T. Mitchell did not apparently read the motion. The motion was denied. The grounds for denial included the failure to cite a rule of procedure in support of the motion (yet such a rule was referenced in the motion). The claim for costs and attorney fees was denied on the additional ground that the Defendants' pleading did not contain a request for attorney fees (which I.R.C.P Rule 54(e)(4) specifically

states is not necessary). This ground for denial of the motion for reconsideration was not even asserted by Mr. Poorman in his opposition papers to the motion. The Court supplied Mr. Poorman with his argument. Attorney fees and costs were denied to your affiant and his clients even though the Court admonished Mr. Poorman for perpetrating a fraud on the Court. An appeal was filed by your affiant for the Defendants and the Court of Appeal overturned the trial court's ruling on the matter. The Idaho Supreme Court took the case on review but no decision has been issued on the review. Your affiant believes that the Court's ruling in the *Straub v. Smith* case was motivated by the Court's bias and prejudice against your affiant.

Affidavit of John P. Whelan, pp. 3-4, ¶ 5. The rulings against Mr. Whelan's client in *Straub v. Smith* were simply not motivated in any way by bias or prejudice on behalf of this Court. The Court has reviewed the intact Court file in *Straub v. Smith* and is convinced of that fact. Mr. Whelan's affidavit raises several issues. Since *Straub v. Smith* is still under consideration by the Idaho Supreme Court, it would be inappropriate for this Court to comment on the *merits* of anything that occurred in that case.

Mr. Whelan claims: "The Honorable John T. Mitchell did not apparently read the motion [to reconsider]." *Id.* A review of the court file in *Straub v. Smith* shows that a hearing was held on May 10, 2005, on Smith's (Mr. Whelan's client) Motion to Reconsider. At that hearing, a review of the court minutes show that not only did this Court indicate on the record that it had reviewed the Motion to Consider, but articulated the grounds Mr. Whelan set forth in that motion. The Court mentioned *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991) as a case on point, a case neither attorney in *Straub* cited to the Court. So not only did the Court read Mr. Whelan's motion to reconsider, since Mr. Whelan's motion contained no citations to any legal authority, the Court conducted its own research.

The bottom line is that in *Straub v. Smith,* Mr. Whelan did what he should have done if he and/or his client disagreed with this Court's rulings...they filed a request for

reconsideration and then an appeal.

A request for reconsideration is exactly what the Lawrences did in *Capstar v. Lawrence,* CV 2002 7671, and an appeal is exactly what Mr. Whelan and his clients have done in *Capstar* and *Tower Asset Sub, Inc. v. Lawrence,* CV 2003 4621. An appeal is the appropriate action to take if you believe a judge has committed error, made a mistake, or misunderstood the facts or the law. The rulings made against Mr. Whelan's client in *Capstar* and *Tower Asset* were not in any way made or motivated by bias or prejudice against Mr. Whelan by this Court. In fact, this Court's ruling in the *Capstar* case was made **before** Mr. Whelan even appeared in that case. The ruling was made in *Capstar* while the Lawrences were proceeding *pro se.* For the same reasons set forth above in *Straub v. Smith,* it would be inappropriate for this Court to discuss the merits of these two cases.

Mr. Whelan claims bias or prejudice on behalf of the Court because counsel for plaintiffs in *Capstar v. Lawrence,* CV 2002 7671 and *Tower Asset Sub, Inc. v. Lawrence,* CV 2003 4621 "...Susan Seeks [sic], the partner of Lee James, a friend of the Honorable John T. Mitchell and the current president of the Idaho Trial Lawyers Association." Affidavit of John P. Whelan, p. 4, ¶ 6. It is true that plaintiffs' counsel in *Capstar* and *Tower Asset,* Susan Weeks, is in the same law firm as Lee James. However, the undersigned has no knowledge as to whether they are partners or what their professional relationship is. It is true that Lee James is president of the Idaho Trial Lawyers Association, but the undersigned was unaware of that fact until the undersigned read Mr. Whelan's affidavit and confirmed the fact by viewing the ITLA website. Mr. Whelan has not made clear what Mr. James being president of ITLA has to do with anything. The undersigned *was* a member of the ITLA five and one half years ago, but is not a member

now that he is a district judge. The undersigned was the attorney of record for ITLA in the case *In the Matter of the Estate of Dianne Rothe*, but the undersigned received no financial remuneration for all time spent on that case. That matter was handled *pro bono* during the undersigned's involvement. In the general sense of the word, the undersigned is a "friend" of Lee James, but has not seen Lee James in other than a professional setting in more than fourteen months. The last time the undersigned saw Lee James socially was at a fund raising event for ICARE, a child abuse prevention agency. Lee James may have appeared in court before the undersigned in the past fourteen months as an attorney in a hearing, but the undersigned has no recollection of that one way or another. The Court is confident it has not spoken to Lee James or seen Lee James socially since the ICARE fund raising event. Along with Peter Erbland, Lee James helped organize a fund raising event for the undersigned in his re-election, but that occurred about fifteen months ago. The fund raising event was held at Mr. Erbland's law firm and other than that fact, the undersigned is not aware of what efforts Mr. James expended on that fund raising event.

Mr. Whelan then makes the claim that:

> 8. In the recent cases of *Krivor v. Rogers* (CV-06-6252) and *Metropolitan Property & Casualty v. Allen* (CV-06-6358), where your affiant represents the Rogers and the Allens, Defendants in the actions, the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point. Your affiant believes the Court has singled out your affiant for treatment that is different from the treatment received by other attorneys appearing before the Honorable John T. Mitchell.

Affidavit of John P. Whelan, p. 5, ¶ 85. The claim that "the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point", without more, is a difficult claim in which to form a response. Since those are pending cases, it is improper to

respond to the merits of any legal arguments raised in those cases by Mr. Whelan. First of all, it should go without saying that argument supported by cases directly on point will be more persuasive than an argument lacking that support. Second, the allegation by Mr. Whelan that "...the Honorable John T. Mitchell has seemingly made it clear that the Court will not entertain argument from your affiant unless the argument is supported by cases directly on point" lacks specificity as to any particular ruling made at a particular hearing. A review of the court minutes on *all* hearings held in *Krivor* and *Metropolitan* show that at no time was Mr. Whelan not allowed to present argument, nor was he cut off on any argument, nor was he told that without cases on point his arguments would not be entertained. In *Krivor*: Mr. Whelan did not attend the January 30, 2007 hearing; Mr. Whelan did not attend the February 20, 2007, hearing; Mr. Whelan attended the April 26, 2007, hearing and argued without interruption; Mr. Whelan did not attend the May 23, 2007, hearing. In *Metropolitan*: Mr. Whelan did not appear at the December 19, 2006 scheduling conference, he had on November 8, 2006 faxed the Court in chambers a copy of a Notice of Appearance, but no filing fee was paid so the pleading was not filed; Mr.Whelan attended the March 22, 2007 hearing and argued without interruption; Mr. Whelan attended the April 24, 2007 hearing and argued without interruption. If the Court in *Krivor* and *Metropolitan* failed to entertain an argument by Mr. Whelan, one would expect a motion for reconsideration. A review of the court files in *Krivor v. Rogers* (CV-06-6252) and *Metropolitan Property & Casualty v. Allen* (CV-06-6358) reveals no motions for reconsideration filed by Mr. Whelan on behalf of his clients therein.

A review of the court files in the following cases show no motion for disqualification *for cause* (I.R.C.P. 40(d)(2)) has ever been filed: *Krivor v. Rogers* (CV-06-6252), *Metropolitan Property & Casualty v. Allen* (CV-06-6358), *Straub v. Smith,* (CV-04-5437),

Sauls v. Luchi (CV-04-1616). While that fact has little, if anything, to do with this Court not being biased or prejudiced against Mr. Whelan, if Mr. Whelan's feeling that this Court was biased or prejudiced against him goes back to November 21, 2001, one would have expected a motion for disqualification to have been made in one of these cases at an earlier time. On November 15, 2006, a motion to disqualify *without cause* (I.R.C.P. 40(d)(1)) was made by Mr. Whelan on behalf of his client in *Krivor v. Rogers,* and that motion was granted on November 16, 2006. Following objection from opposing counsel as to the issue of service, that order was rescinded by an order dated November 20, 2006. If there were concerns as to bias or prejudice of this Court, a motion for disqualification ***for cause*** would certainly have been anticipated in that case at that time.

Decisions from the Idaho Supreme Court were issued on January 26, 2007, in *Tower Asset Sub Inc., v. Lawrence* and *Capstar Radio Operating Company v. Lawrence.* Mr. Whelan states that regarding those two cases an appeal was taken by the defendants, that the Idaho Supreme Court overturned the grant of summary judgment, then notes "Your affiant believes that the result on the appeal has merely increased the bias and prejudice of the Court against your affiant." Affidavit of John P. Whelan, pp 4-5, ¶¶ 6, 7. The Court has read the decisions in both cases and finds them to be well written. As noted by the Idaho Supreme Court, this Court committed error, and the Idaho Supreme Court reversed that error. Those appellate decisions are the "law of the case" in these two cases. This Court is human. It is quite a different thing to argue that because this Court committed error, which the Idaho Supreme Court corrected, that this Court would then hold against Mr. Whelan the fact he prevailed on behalf of his clients on those appeals. Quite the contrary. Mr. Whelan is to be commended for bringing those appeals and having the Idaho Supreme Court correct the mistake. He did the right thing. "The results of the appeal" (Affidavit of John P. Whelan, p. 5, ¶ 7), create no bias or prejudice

against Mr. Whelan whatsoever. The Idaho Court of Appeals held in *Desfosses v. Desfosses*, 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), "A disqualifying prejudice cannot be deduced from adverse rulings by a judge, whether they are right or wrong." *Citing* 46 Am.Jur.2d *Judges* § 221 (1969). Adverse rulings alone do not support the existence of a disqualifying prejudice. *Bell v. Bell,* 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992). "Merely because a judge has participated in prior legal proceedings involving related parties or issues does not provide grounds for the judge to recuse himself." *Roselle v. Heirs and Devisees of Archie Grover,* 117 Idaho 530, 534, 789 P.2d 526, 530 (Ct.App. 1990).

At oral argument on June 13, 2007, Mr. Whelan mentioned that in *Capstar* the Court found the language in the deed to be unambiguous, and the language in the same deed to be ambiguous in *Tower Asset.* Certainly that was a mistake by this Court, and that mistake was pointed out by the Idaho Supreme Court in *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 5, n. 2 (January 26, 2006). However, that mistake by this Court does not indicate bias or prejudice against Mr. Whelan. To the extent the mistake needs to be explained to address any concerns of Mr. Whelan, it is explained as follows: On April 14, 2004, this Court heard argument on plaintiff's motion for summary judgment in *Capstar,* and Lawrences' argument was presented by Douglas Lawrence, *pro se.* In granting summary judgment, the Court found the language of the deed and sales agreement unambiguous. The Lawrences *pro se* made a motion to reconsider in *Capstar,* and at hearing on that motion on April 29, 2004, this Court again stated the deed was unambiguous. The *Tower Asset* motion for summary judgment was heard *seven months later* on November 9, 2004, and argument was presented by Mr. Whelan. While the finding of ambiguity/unambiguity is inconsistent, the Court was faced with two different

arguments by two different people, one a lawyer and one not, on two different days seven months apart. The ambiguous/unambiguous nature of the deed and sales agreement was not the basis for the reversal in these cases by the Idaho Supreme Court. The Idaho Supreme Court found that neither the deed nor the sales agreement created an express easement. *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, pp. 6-7 (January 26, 2006); *Capstar Radio Operating Company v. Lawrence,* 2007 Opinion No. 13, p. 4 (January 26, 2006). Thus, even if there were some logic to the argument that the Court was biased or prejudiced because the Court found the documents ambiguous in the case Mr. Whelan argued and unambiguous in the case Douglas Lawrence argued seven months earlier, that specific ruling was not relevant. What is relevant as far as any bias or prejudice by the Court is the fact that in both cases, one argued *pro se* by Douglas Lawrence and one argued by Mr. Whelan, the result was the same. There is no differential treatment by this Court as between Mr. Whelan or Douglas Lawrence.

At oral argument on June 13, 2007, Mr. Whelan mentioned several issues he had not mentioned in his "Motion for Disqualification for Cause" or his "Affidavit of John P. Whelan". First, Mr. Whelan mentioned that he had won jury trials and court trials before the undersigned. At oral argument Mr. Whelan stated he had "...a string of motions that had not been granted by the Court." Not every attorney wins every motion, and not every attorney wins half of the motions they bring or defend. Mr.Whelan's affidavit mentions *Sauls v. Luchi* (one motion), *Straub v. Smith* (one motion and a motion to reconsider that motion) and now *Capstar v. Lawrence* (one motion but as previously mentioned, Mr. Whelan was not counsel for Lawrences when *Capstar* was decided) and *Tower Asset Sub, Inc. v. Lawrence* (one motion). Even if it were proper to base a claim of bias or prejudice upon past adverse rulings (*Desfosses* and *Bell* show it is not proper), **four**

motions is hardly a significantly large statistical sample upon which to base a claim of bias or prejudice resting upon prior decisions rendered. And if keeping score were proper (it is not), one would think you would weigh those motions against the court **trials** Mr. Whelan indicated he had won which were assigned to this Court.

At oral argument Mr. Whelan for the first time raised the case of *Whelan v. Mills,* a fee dispute between Mr. Whelan and a client that was assigned to this Court, as another example of how this Court exhibited bias or prejudice against Mr. Whelan. Mr. Whelan did not have a case number, but the Court researched the matter and reviewed the court file in Kootenai County Case No. CV 2003 3582. In *Whelan v. Mills* Mr. Whelan in his complaint alleged the Mills owed him $11,903.74. In their answer the Mills claimed Mr. Whelan owed the Mills $4,085.00 for work they had done for Mr. Whelan. After a May 24, 2004, court trial before the undersigned, this Court found the Mills owed Mr. Whelan $6,453.89. Part of the reason Mr. Whelan was found to not be entitled to all he was claiming was he had unilaterally raised his hourly rate from $125.00 to $150.00 per hour. The remaining reason Mr. Whelan was found to not be entitled to all he claimed was Greg Mills was entitled a credit for work he had performed on Mr. Whelan's land. However, instead of the $4.085.00 credit the Mills were seeking, the Court found them only entitled to $1,290.00. It is difficult to see how this Court's ruling in that case amounts to bias or prejudice against Mr. Whelan.

Finally, while the following argument has not been made by Mr Whelan, it needs to be addressed. It could be argued that simply because Mr. Whelan has made this motion to disqualify, and his affidavit contains many allegations of bias and prejudice against the undersigned, such allegations of bias or prejudice alone would ***now*** render the Court biased and prejudiced. There have been other motions to disqualify the undersigned for cause in the past, and there will be similar motions in the future. While such motions are

infrequent, the undersigned is duty bound to take the claims very seriously. The undersigned has given careful attention to the claims of bias and prejudice and can assure the parties and their attorneys, especially Mr. Whelan, that no bias or prejudice is present merely because this motion has been made. Mr. Whelan has concerns. Mr. Whelan is commended for bringing those concerns to the Court's attention. It is unfortunate that Mr. Whelan did not raise these concerns earlier as he has apparently harbored them for at least a couple of years since *Sauls v.Luchi* was decided. But Mr. Whelan has come forth and raised his concerns at this time in this motion to disqualify for cause in this case. He has that *right.* Indeed, if he is sincere in those concerns, and there is no reason to believe he is not sincere in those beliefs, then he has a *duty* to consult with his client, and if his client consents, to raise those concerns with the Court. The filing of this motion to disqualify for cause does not in any way result in bias or prejudice by the Court. The Court is neither insulted nor inconvenienced in any way by the filing of the motion. Mr. Whelan has concerns and the Court must address those concerns. The reason for the length of this written opinion is to address those concerns.

The affidavit of Mr. Whelan uses terms such as: "Your affiant believes that Judge Mitchell disqualified himself...because...Judge Mitchell was biased or prejudice [sic] against John P. Whelan at that time" (Affidavit of John P. Whelan, p. 2, ¶ 3); "Your affiant believes that judge Mitchell voluntarily disqualified himself in the case because he had a 'personality conflict' with your affiant..." (*Id.*); "Your affiant believes that the Court's action was motivated by bias or prejudice against your affiant..." (*Id.* p. 3, ¶4); "The Honorable John T. Mitchell did not apparently read the motion" (*Id.* p. 3, ¶ 5); "Your affiant believes that the Court's ruling in the *Staub v. Smith* case was motivated by the Court's bias and prejudice against your affiant" (*Id.* p. 4, ¶ 5); and "Your affiant believes

the Court has singled out your affiant for treatment that is different from the treatment received by other attorneys appearing before the Honorable John T. Mitchell" *Id.* p. 5, ¶ 8. As stated by the Idaho Court of Appeals upholding a denial of a motion for disqualification for cause by a judge: "Suspicion, surmise, speculation, rationalization, conjecture, innuendo, and statements of mere conclusions...may not be substituted for a statement of facts." *Desfosses v. Desfosses,* 120 Idaho 27, 30, 813 P.2d 366, 369 (Ct.App. 1991), *citing Walker v. People,* 126 Colo. 135, 248 P.2d 287, 295 (1952). While Mr. Whelan's concerns are not "facts", making this motion to disqualify for cause is about the only way he could air these concerns he has. Mr. Whelan's concerns are unfounded. That is not to say Mr. Whelan is not sincere when he says he has those feelings. But it is to say that this Court simply does not harbor the bias and prejudice alleged by Mr. Whelan. The undersigned is not biased or prejudiced against Mr. Whelan or against his present clients in this case, or his past clients in past cases.

C. Campaign Contributions by Opposing Counsel's Firm.

Mr. Whelan raised the issue of campaign contributions for the first time at oral argument on June 13, 2007. Mr. Whelan made an offer of proof that the firm of which Susan Weeks is a partner contributed $1,000 to the undersigned's re-election fund in the spring of 2006, according to the Sunshine Disclosure filed with the State of Idaho Secretary of State. At oral argument, Mr. Whelan also mentioned that attorney Scott Poorman, the attorney opposing Mr. Whelan in *Straub v. Smith, supra,* donated to the undersigned's re-election fund in the spring of 2006. The problem with the argument regarding Mr. Poorman is that the last action taken by this Court in *Straub v. Smith* occurred on May 10, 2005 (a year **before** the election and Mr. Poorman's contribution), when this Court signed the Order Denying Defendant's Motion for Reconsideration.

There cannot even be the appearance of a *quid pro quo* when the predicate contribution has not even yet occurred.

As to the contribution to the undersigned's re-election fund by Ms. Week's firm, there was no evidence that Ms. Weeks made the contribution or that she consented to the contribution, or even that there is a partnership. If the Court were to assume that she consented and that her firm is a partnership, there still is no basis for the Court to disqualify himself.

First of all, had the offer of proof not been made by Mr. Whelan at the hearing on June 13, 2007, the undersigned would still to this day be ignorant of what is contained in the Sunshine Report regarding Ms. Weeks' law firm. The Court disclosed on the record at the June 13, 2007, hearing the fact that it had not reviewed the Sunshine Report, but assumed it was accurate as the Court trusts his campaign treasurer who filed the report. The reason the Court has not reviewed the financial disclosure report is the Court must abide by the Idaho Code of Judicial Conduct. Cannon 5(C)(2) states in part: "Except as required by law, a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign." Since the Court was at all times ignorant of this financial contribution, the Court could not and was not biased or prejudiced in favor of Ms. Weeks. Likewise, the Court was not biased or prejudiced against Mr. Whelan as a result of a contribution made by Ms. Weeks' firm, of which it was, up to June 13, 2007, ignorant.

Now the Court has been made aware of that fact by Mr. Whelan, the Court must now make two determinations. First, does the knowledge of Ms. Weeks' firm's contribution result in any bias or prejudice in her favor? Second, is this now a "proceeding in which the judge's impartiality might reasonably be questioned", which

includes but is not limited to instances "where the judge has a personal bias or prejudice concerning a party or a party's lawyer." Cannon 3(E)(1)(a). Campaign contributions of which a judge has knowledge, made by lawyers or other who appear before the judge, may be relevant to disqualification." Comment to Cannon 5(C)(2).

This Court can honestly say that the contribution by Ms. Weeks' firm in no way results in any bias or prejudice in her favor. There are several reasons for this. **First**, there is more than one attorney in Ms. Weeks' firm. The firm's phone book ad lists three attorneys. It is unknown who made the decision to contribute. **Second** is the *amount* of the contribution. A candidate's committee may only solicit and accept reasonable contributions from lawyers. Cannon 5(C)(2). One thousand dollars is a reasonable amount from a firm of lawyers. According to Mr. Whelan's own offer of proof, other firms donated similar amounts or more. **Third,** since the undersigned was ignorant of the contribution until Mr. Whelan's offer of proof, obviously no one within the firm expected or asked for any preferential treatment as a result of the contribution.

No cases were cited by Mr. Whelan on this issue at the June 13, 2007 hearing. Since the issue was raised by Mr. Whelan for the first time at hearing, Ms. Weeks cited no cases. Campaign contributions cannot serve as independent grounds for recusal. *Degarmo v. State,* 922 S.W.2d 256, 267 (Tex.App. 1996), *citing River Road Neighborhood Association v. South Texas Sports, Inc.* 673 S.W.2d 952, 953 (Tex.App. 1984). In that case, the judge was found not to have abused his discretion when he accepted a $500 campaign contribution from a murder victim's family. *Id.* In *Rocha v. Ahmad,* 662 S.W.2d 77 (Tex.App. 1983), the Court of Appeals of Texas unanimously held that one of its members should not be disqualified even though two of the justices had received "...many thousands of dollars from or though the Law Office of Pat

Maloney, P.C. (attorney for the appellees)". *Id.* In *River Road Neighborhood Association,* 673 S.W.2d 952 (Tex.App. 1984), it was held that two justices on the Texas Court of Appeals, one who had received 21.7% of his total reported campaign contributions, and another justice who had received 17.1% of his total reported campaign contributions from South Texas Sports, a party to the litigation, were not disqualified because neither of the "...challenged Justices may gain or lose anything of a pecuniary or personal nature because of any judgment that might be rendered in this case." The $1000 contribution from Ms. Weeks' firm is significantly less than 17.1% of all amounts contributed to the undersigned's campaign, as the undersigned himself spent $12,000.00 of his own funds on such campaign, and the undersigned is aware that over $50,000 was spent on the campaign (thus assumes about $38,000 was raised from other people). There is no contention made, nor is there any way possible the undersigned could gain or lose from any future rulings in either the *Capstar* or the *Tower Asset* case.

In *MacKenzie v. Super Kids Bargain Store* and *MackKenzie v. Breakstone,* 565 So.2d 1332 (Fla. 1990), the Supreme Court of Florida held that an allegation in a motion for disqualification "...that a litigant or counsel for a litigant has made a legal campaign contribution to the campaign of the trial judge, or the political campaign of the trial judge or the trial judge's spouse (two consolidated cases on appeal) without more, is not a legally sufficient ground" for disqualification. 565 So.2d at 1334. The Florida Supreme Court noted: "As with other campaigns, judicial campaigns require funds." 565 So.2d at 1335. "Judicial campaigns and the resultant contributions to those campaigns, therefore are necessary components to our judicial system." *Id.* The Florida Supreme Court noted that "...the United States Supreme Court has raised two concerns raised by contributions to campaigns for public office: 'I. The tendency or possibility to create a quid pro quo

relationship and, 2. The creation of an appearance of influence or corruption.'" *Id.* The Florida Supreme Court then held:

> However, we find that Florida's Code of Judicial Conduct together with Florida's statutory limitation upon campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against the above-entitled concerns regarding contributions to constitutionally mandated judicial campaigns and render the ground alleged in the motions at bar legally insufficient when presented as the sole ground for disqualification.

565 So.2d at 1336. There are thus, three factors. First, the applicable Florida Judicial Conduct provision was that judicial candidates "*should not himself solicit campaign funds, or solicit attorneys for publicly stated support,* but he may establish committees of responsible person to secure and manage the expenditure of funds..." *Id.* (emphasis in original). Idaho has essentially identical language: "A candidate shall not solicit campaign contributions in person." Canon 5(C)(2). "A candidate may establish committees of responsible person to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds..." *Id.* Second, the per person campaign contribution limit in Florida for a district judge in 1990 was $2,000. 565 So.2d at 1336. In Idaho that amount at present is $1,000. Idaho Code § 67-6610A. Third, Florida statute requires disclosure by the campaign treasurer of amounts and name address and occupation of each person who made a contribution over $100. 565 So.2d at 1336. Idaho requires the same disclosure, but for any amounts over $50. Idaho Code § 67-6610. Thus, Idaho's statutes are twice as restrictive today as Florida's statutes were 17 years ago.

In addition to the three factors discussed in *MacKenzie,* there are two additional factors that indicate that the campaign contributions are not legally sufficient grounds for

recusal in the instant case. Fourth, the passage of time since the contribution. The contribution had to have been over a year before Mr. Whelan brought his motion on behalf of the Lawrences. The fact of the contribution was available for Lawrences and Mr. Whelan to ascertain through the Secretary of State's website for nearly a year, yet nothing was mentioned until plaintiffs in the two cases renewed their motion for summary judgment. Fifth, the undersigned in fact did not know of the contribution by Ms. Weeks' firm until the June 13, 2007, hearing and heard of such only through Mr. Whelan. It is hard to have a *quid pro quo* relationship when one is ignorant of the contribution.

The Florida Supreme Court cited a Nevada Supreme Court case:

> In Florida, as in Nevada, "leading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases in which the attorney might be involved." *Ainsworth v. Combined Ins. Co. of America,* 774 P.2d 1003, 1020 (Nev. [1989]) cert. denied 493 U.S. 958, 110 S.Ct. 376, 107 L.Ed.2d 361 (1989).

565 So.2d at 1337-38. In *MacKenzie*, the Florida Supreme Court held that even though the ground (campaign contributions) was legally insufficient, the motion for disqualification should have been granted because in ruling on the motion for disqualification, Judge Mackenzie "went beyond a mere determination of the legal sufficiency of the motion and passed upon the truth of the facts alleged." 565 So.2d at 1339. This is because **Florida has a rule that prohibits such**. The Florida Supreme Court stated: "...our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.'" *Id.* "When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and *on that basis alone* established the grounds

for his disqualification." *Id.* **Idaho has no such rule**. Obviously Texas has no such rule as the courts in the above cases discussed the allegations of prejudice. Obviously Nevada has no such rule as the reasons put forth by the judge who was sought to be disqualified (Justice Gunderson) were discussed in detail. *Ainsworth v. Combined Ins. Co. of America,* 774 P.2d 1003, 1020-22 (Nev. 1989), *cert. denied* 493 U.S. 958, 110 S.Ct. 376, 107 L.Ed.2d 361 (1989). This Court finds that a simple denial of the Motion to Disqualify for Cause, without a discussion, would create an untenable result, in that neither Mr. Whelan nor his clients would have any idea how the Court treated these various allegations raised by Mr. Whelan. Should this decision be appealed and the Idaho Supreme Court or Court of Appeals graft a rule that the judge may only adjudicate the question of disqualification, so be it. This Court is convinced that since there is no such rule, the more fair result to all parties and counsel is to discuss the various allegations.

III. ORDER.

IT IS HEREBY ORDERED that in the exercise of this Court's discretion, for the reasons set forth above, defendants' Motion for Disqualification for Cause pursuant to I.R.C.P. 40(d)(2), in *Capstar v. Lawrence,* CV 2002 7671 is **DENIED** and defendants' Motion for Disqualification for Cause pursuant to I.R.C.P. 40(d)(2) in *Tower Asset Sub, Inc. v. Lawrence,* CV 2003 4621 is **DENIED**.

Entered this 25th day of June, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John P. Whelan	208 664-2240	Susan Weeks	208 664-1684

Secretary

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED
2007 JUL -9 PM 4:47
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	CASE NO. CV-02-7671 MOTION FOR PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER HEARING DATE: TIME: JUDGE: JOHN T. MITCHELL

COMES NOW the Defendants, Douglas Lawrence and Brenda Lawrence, by and through their attorney of record, John P. Whelan, and hereby motions this court, pursuant to Rules 12(a) and 12(b) of the Idaho Appellate Rules for an Order for Permission to Appeal from an Interlocutory Order. Defendants request an Order granting them permission to appeal the Memorandum Decision and

Order Denying Motion for Disqualification for Cause, I.R.C.P 40(d)(2) filed June 25, 2007.

This motion is made on the grounds that good cause was shown for disqualification. Moreover, the Court engaged in an independent investigation of the facts and considered evidence gathered independently by the Court and which was not presented by counsel in reaching the Court's decision to not disqualify the Court from further proceedings. The independent investigation also incorporated speculation that was not warranted by the facts.

Defendants request oral argument.

DATED this 9 day of July, 2007.

Respectfully Submitted,

John P. Whelan

John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9TH day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
√ Facsimile: (208) 664-1684

Jessica Tvrdy

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:
2007 JUL -9 PM 4:47
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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

MOTION FOR RECONSIDERATION

HEARING DATE:
TIME:
JUDGE: JOHN T. MITCHELL

COMES NOW, Defendants, Douglas P. Lawrence and Brenda J. Lawrence, by and through their attorney, John P. Whelan, hereby move the Court for reconsideration of the Court's Memorandum Decision and Order Denying Motion for Disqualification for Cause, I.R.C.P. 40(d)(2). This Motion is made pursuant to

095

Idaho Rules of Civil Procedure Rule 11(a). This motion is made on the grounds that the court should have ruled on the motion based on the evidence offered. The Court should not have conducted its own independent investigation of the facts without the permission of counsel.

This motion is based on the court's files and records in this proceeding together with any affidavits filed in support of this motion.

Defendants request oral argument .

DATED this 9 day of July, 2007.

JOHN P. WHELAN, P.C.

By: John P. Whelan
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9TH day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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COUNTY OF KOOTENAI
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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

AFFIDAVIT OF JOHN P. WHELAN

HEARING DATE:
TIME:
JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could competently testify. This affidavit is offered in support of Defendants' motion for reconsideration of an order of the Court denying Defendants' motion for disqualification for cause pursuant to I.R.C.P. 40(d)(2) filed on June 25, 2007.

2. In the course of making the decision on Defendants' motion for disqualification for cause the Court obviously engaged in independent fact finding before reaching a decision on Defendants' motion. The Court even reviewed a case that was not identified by this affiant as being relevant to the motion for disqualification. Additionally, the Court engaged in speculation in creating an argument for denial of the motion for disqualification when the clear inference to be drawn from the *evidence offered* was that the Court disqualified itself in the case of *Yovichin v. Bush* (CV-2001-2116) for bias and prejudice against this affiant.

3. The Court then based the denial of Defendants' motion for disqualification on the Court's independent investigation of the facts and the speculation as to why the Court disqualified itself in *Yovichin v. Bush* (CV-2001-2116). The speculation and independent investigation by the Court was improper, thus increasing the appearance of impartiality. Idaho Code of Judicial Conduct Canon 3.

DATED this 9 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 9TH day of July, 2007.

JESSICA TVRDY NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Post Falls,
My Comm. Expires: 12/29/11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9TH day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

SUPPLEMENTAL AFFIDAVIT OF JOHN P. WHELAN

HEARING DATE: August 6, 2007
TIME: 1:30 p.m.
JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could

competently testify. This affidavit is offered in support of Defendants' motion for reconsideration of an order of the Court denying Defendants' motion for disqualification for cause pursuant to I.R.C.P. 40(d)(2) filed on June 25, 2007.

2. On behalf of the Lawrences I filed a motion requesting that the Honorable John T. Mitchell disqualify himself for cause due to bias and/or prejudice against your affiant. The Court did not rule on the motion when the oral argument was presented on June 13, 2007, the matter was taken under submission

3. On June 25, 2007, the Court filed its decision denying the motion for disqualification. The decision was filed only after the Court conducted its own independent investigation into the facts. The decision of the Court was obviously based on matters outside of the record in this proceeding, and based on matters not even referenced by your affiant in the motion or at oral argument.

4. Your affiant made no reference to the case of the *Estate of Diane Rothe*, Case No. SP 00675 (2000). The Court nevertheless performed an independent review of this case and opined that the case *may* have been the reason why the Court voluntarily disqualified itself in the case of *Yovichin v. Bush*, a case where your affiant was the attorney of record for the Defendant in the action. The Court speculated in its June 25, 2007 decision that the voluntary disqualification *might* have been filed due to the adversarial role that attorney Mitchell played in that case before taking the bench.

5. The *Estate of Diane Rothe* was a probate action. Your affiant was the attorney for the estate. The will of Diane Rothe provided for a contingent bequest (in the sole discretion of the trustees) to the Idaho Trial Lawyers Association for educational purposes. The Idaho Trial Lawyers Association did not have a vested gift from the estate. The "gift" was entirely discretionary on the part of the trustee of the trust. Attorney John T. Mitchell was the Treasurer of the ITLA at the time. Attorney Mitchell sent letter after letter to your affiant over a ten (10) month period. The correspondence demanded information from the file and sought to counsel your affiant as to how to probate the estate and what his obligations were. At one point, attorney Mitchell filed a Petition for Removal of Personal Representative seeking to remove my client from the position of personal representative of the estate. Attorney Mitchell sought to have the son of Diane Rothe removed from the case so that a third party could be appointed as personal representative of the estate.

6. My client wanted to report attorney Mitchell to the State Bar for seeking the appointment of a substitute personal representative when attorney Mitchell did not represent the person who attorney Mitchell sought to appoint as substitute personal representative of the estate.

7. A true and correct copy of a letter acknowledging this fact is attached as Exhibit A. The letter was received from attorney Mitchell.

8. The relationship between myself and then attorney Mitchell was not adversarial, it was hostile. Leeander James took over the Rothe case from attorney Mitchell when he took the bench.

9. Although not mentioned by the Court in the decision denying the motion for disqualification, attorney Mitchell and your affiant had a second case together before attorney Mitchell took the bench. That case was *Diteman v. R & L RV Sales and Service, Inc.*, Case No. CV-00-1973 I questioned attorney Mitchell's ethics in that case as well in the course of my representation of R & L RV. That was a case where R & L RV purchased a used recreational vehicle. Apparently a prior owner had rolled-back the odometer reading of the vehicle—erasing thousands of miles of use. R & L was unaware of this fact when it bought that used recreational vehicle.

10. The attorney who represented R & L RV before your affiant took over the representation had erroneously answered a discovery request that made it appear that R & L had not been supplied an odometer disclosure form when in fact it had. Your affiant brought the error to the attention of attorney Mitchell. Although R & L RV committed no wrong, attorney Mitchell would not dismiss the company from the lawsuit. I questioned the ethics of attorney Mitchell in continuing to pursue R & L RV even though the company committed no wrong.

11. R & L RV eventually bought its way out of the case through a statutory offer of settlement.

12. The cases of *Rothe* and *R & L RV* provide the background for why the Honorable John T. Mitchell voluntarily disqualified himself in the case of *Yovichin v. Bush*, a case where I was counsel for the Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ✓ U.S. Mail, postage prepaid
____ Facsimile: (208) 664-1684

John P. Whelan

DATED this 23 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 23 day of July, 2007.

JESSICA TVROY NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Post Falls
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ISB# 6083

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:
2007 JUL 23 PM 5:16
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	CASE NO. CV-02-7671 MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION HEARING DATE: August 6, 2007 TIME: 1:30 p.m. JUDGE: John T. Mitchell

Defendants, Douglas P. Lawrence and Brenda J. Lawrence, by and through their attorney of record, John P. Whelan, submits the following memorandum in support of motion for reconsideration:

STATEMENT OF FACTS

Counsel for the Lawrences filed a motion requesting that the Honorable John T. Mitchell disqualify himself for cause due to bias and/or prejudice against the Lawrences' counsel. The Court did not rule on the motion when the oral argument was presented on June 13, 2007.

On June 25, 2007, the Court filed its decision denying the motion for disqualification. The decision was filed only after the Court conducted its own independent investigation into the facts. The decision of the Court was obviously based on matters outside of the record in this proceeding, and based on matters not even referenced by counsel in the motion or at oral argument.

Counsel for the Lawrences made no reference to the case of the *Estate of Diane Rothe*, Case No. SP 00675. The Court nevertheless performed an independent review of this case and opined that the case *may* have been the reason why the Court voluntarily disqualified itself in the case of *Yovichin v. Bush*, a case where the Lawrences' counsel was the attorney of record for the Defendants in the action. The Court speculated in its June 25, 2007 decision that the voluntary disqualification *might* have been filed due to the adversarial role that attorney Mitchell played in that case before taking the bench.

The *Estate of Diane Rothe* was a probate action. John P. Whelan was the attorney for the estate. The will of Diane Rothe provided for a contingent bequest to the Idaho Trial Lawyers Association for educational purposes. The Idaho Trial Lawyers Association did not have a vested gift from the estate. The

"gift" was discretionary with the trustees of a trust that was to be created. Attorney John T. Mitchell was the Treasurer of the ITLA at the time. Attorney Mitchell sent over a dozen letters to attorney Whelan over a ten (10) month period. The correspondence demanded information from the file and sought to counsel attorney Whelan as to how he should probate the estate and what his obligations were. At one point, attorney Mitchell filed a Petition for Removal of Personal Representative seeking to remove attorney Whelan's client from the position of personal representative of the estate. Attorney Mitchell sought to have the son of Diane Rothe removed from the case so that a third party could be appointed as personal representative of the estate.

Attorney Whelan's client wanted to report attorney Mitchell to the State Bar for seeking the appointment of a substitute personal representative when attorney Mitchell did not represent the person who attorney Mitchell sought to appoint as substitute personal representative of the estate.

A copy of a letter acknowledging this fact is attached to the accompanying supplemental affidavit of John P. Whelan.

The relationship between attorney Whelan and then attorney Mitchell was not adversarial, it was hostile. Leeander James took over the Rothe case from attorney Mitchell when he took the bench.

Although not mentioned by the Court in the decision denying the motion for disqualification, attorney Mitchell and attorney Whelan had a second case together before attorney Mitchell took the bench. That case was *Diteman v. R & L RV Sales and Service, Inc.*, Case No. CV-00-1973. Attorney Whelan

questioned attorney Mitchell's ethics in that case in the course of Whelan's representation of R & L RV. That was a case where R & L RV purchased a used recreational vehicle. Apparently a prior owner had rolled-back the odometer reading of the vehicle—erasing thousands of miles of use. R & L was unaware of this fact when it bought that used recreational vehicle.

The attorney who represented R & L RV before attorney Whelan took over the representation had erroneously answered a discovery request that made it appear that R & L had not been supplied an odometer disclosure form when in fact it had. Attorney Whelan brought the error to the attention of attorney Mitchell. Although R & L RV committed no wrong, attorney Mitchell would not dismiss the company from the lawsuit. Attorney Whelan questioned the ethics of attorney Mitchell in continuing to pursue R & L RV even though the company committed no wrong.

R & L RV eventually bought its way out of the case through a statutory offer of settlement.

The cases of *Rothe* and *R & L RV* provide the background for why the Honorable John T. Mitchell voluntarily disqualified himself in the case of *Yovichin v. Bush*, a case where attorney Whelan was counsel for the Defendants.

IT IS IMPROPER FOR A JUDGE TO PERFORM AN INDEPENDENT INVESTIGATION INTO THE FACTS OF A CASE

The presentation of evidence is a role performed by attorneys. Idaho Code prohibits judges from acting as attorneys. I.C. 1-1802 and 1-1803.

Although stated in dicta, the Supreme Court in *State v. Breyer*, 40 Idaho 324, 232, P. 560 (1925) alluded to the fact that it would be clearly improper for a Judge to make an independent investigation of the facts in a case (or motion).

JUDICIAL CANON 3 E(1)(a)

Canon 3 of the Idaho Code of Judicial Conduct recites that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including situations where the Judge has a personal bias or prejudice concerning a party or a party's lawyer, or has personal knowledge of disputed evidentiary facts. (Emphasis added).

ARGUMENT

The Lawrences counsel presented facts which would suggest, at the very least, that the Honorable John T. Mitchell's impartiality might be reasonably be questioned. The Court took it upon itself to attempt to prove the Lawrences' counsel wrong by conducting an independent investigation of the facts. This is seemingly improper. Furthermore, counsel is placed in a position of having to argue that the Court's investigation was faulty and that the conclusions reached were not justified.

Counsel urges the Court to reconsider its denial of the motion for disqualification for cause based on these facts.

DATED this 23 day of July, 2007.

Respectfully submitted,

JOHN P. WHELAN, P.C.

John P. Whelan

Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation, Plaintiff, vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife, Defendants.	CASE NO. CV-02-7671 AMENDED SUPPLEMENTAL AFFIDAVIT OF JOHN P. WHELAN (WITH EXHIBIT ATTACHED) HEARING DATE: August 6, 2007 TIME: 1:30 p.m. JUDGE: John T. Mitchell

STATE OF IDAHO)
) ss.
County of Kootenai)

I, John P. Whelan, being first duly sworn, deposes and says:

1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could

competently testify. This affidavit is offered in support of Defendants' motion for reconsideration of an order of the Court denying Defendants' motion for disqualification for cause pursuant to I.R.C.P. 40(d)(2) filed on June 25, 2007.

2. On behalf of the Lawrences I filed a motion requesting that the Honorable John T. Mitchell disqualify himself for cause due to bias and/or prejudice against your affiant. The Court did not rule on the motion when the oral argument was presented on June 13, 2007, the matter was taken under submission

3. On June 25, 2007, the Court filed its decision denying the motion for disqualification. The decision was filed only after the Court conducted its own independent investigation into the facts. The decision of the Court was obviously based on matters outside of the record in this proceeding, and based on matters not even referenced by your affiant in the motion or at oral argument.

4. Your affiant made no reference to the case of the *Estate of Diane Rothe*, Case No. SP 00675 (2000). The Court nevertheless performed an independent review of this case and opined that the case *may* have been the reason why the Court voluntarily disqualified itself in the case of *Yovichin v. Bush*, a case where your affiant was the attorney of record for the Defendant in the action. The Court speculated in its June 25, 2007 decision that the voluntary disqualification *might* have been filed due to the adversarial role that attorney Mitchell played in that case before taking the bench.

5. The *Estate of Diane Rothe* was a probate action. Your affiant was the attorney for the estate. The will of Diane Rothe provided for a contingent bequest (in the sole discretion of the trustees) to the Idaho Trial Lawyers Association for educational purposes. The Idaho Trial Lawyers Association did not have a vested gift from the estate. The "gift" was entirely discretionary on the part of the trustee of the trust. Attorney John T. Mitchell was the Treasurer of the ITLA at the time. Attorney Mitchell sent letter after letter to your affiant over a ten (10) month period. The correspondence demanded information from the file and sought to counsel your affiant as to how to probate the estate and what his obligations were. At one point, attorney Mitchell filed a Petition for Removal of Personal Representative seeking to remove my client from the position of personal representative of the estate. Attorney Mitchell sought to have the son of Diane Rothe removed from the case so that a third party could be appointed as personal representative of the estate.

6. My client wanted to report attorney Mitchell to the State Bar for seeking the appointment of a substitute personal representative when attorney Mitchell did not represent the person who attorney Mitchell sought to appoint as substitute personal representative of the estate.

7. A true and correct copy of a letter acknowledging this fact is attached as Exhibit A. The letter was received from attorney Mitchell.

8. The relationship between myself and then attorney Mitchell was not adversarial, it was hostile. Leeander James took over the Rothe case from attorney Mitchell when he took the bench.

9. Although not mentioned by the Court in the decision denying the motion for disqualification, attorney Mitchell and your affiant had a second case together before attorney Mitchell took the bench. That case was *Diteman v. R & L RV Sales and Service, Inc.*, Case No. CV-00-1973 I questioned attorney Mitchell's ethics in that case as well in the course of my representation of R & L RV. That was a case where R & L RV purchased a used recreational vehicle. Apparently a prior owner had rolled-back the odometer reading of the vehicle—erasing thousands of miles of use. R & L was unaware of this fact when it bought that used recreational vehicle.

10. The attorney who represented R & L RV before your affiant took over the representation had erroneously answered a discovery request that made it appear that R & L had not been supplied an odometer disclosure form when in fact it had. Your affiant brought the error to the attention of attorney Mitchell. Although R & L RV committed no wrong, attorney Mitchell would not dismiss the company from the lawsuit. I questioned the ethics of attorney Mitchell in continuing to pursue R & L RV even though the company committed no wrong.

11. R & L RV eventually bought its way out of the case through a statutory offer of settlement.

12. The cases of *Rothe* and *R & L RV* provide the background for why the Honorable John T. Mitchell voluntarily disqualified himself in the case of *Yovichin v. Bush*, a case where I was counsel for the Defendants.

DATED this 24 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 24TH day of July, 2007.

JESSICA TVRDY NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

(208) 664-8111 Telephone

THOMAS A. MITCHELL
JOHN T. MITCHELL
Attorneys At Law
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814-2778

Facsimile (208) 664-8113
E-Mail: jmitchel@dmi.net

December 1, 2000

Fax: (208) 765-1046

J. P. Whelan
702 N. 4th, Suite 200
Coeur d'Alene, ID 83814

Dear Mr. Whelan:

RE: Estate of Dianne Rothe

I have scheduled a hearing on our Petition for Removal of Personal Representative for Cause, and for Appointment of Successor Personal Representative, for January 29, 2001, at 9:30 a.m. before Judge Marano. A Notice of Hearing is enclosed.

Perhaps this matter can be resolved short of that hearing.

The purpose of this letter is to clear up some of the things that you stated during the November 27, 2000 deposition of Jim Hannon.

You stated that your client, Butch Rothe, wanted you to turn me into the Idaho State Bar. I encouraged you to do that if you felt necessary. You then told me that you told your clients to turn me into the bar themselves. Again, if either you or they feel that I have done anything unethical, please have them report me to the bar. If you feel I have done anything unethical, you have an affirmative obligation to turn me into the bar.

During the deposition, you asked Jim Hannon if he had ever discussed with Dianne Rothe, that her whole gift to the foundation could fail because Jim Hannon named himself as a Trustee. That theory which you articulated finds no support in the law. Please review Idaho Rule of Professional Conduct 1.8(c) which states that a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from client, including a testamentary gift, except where the client is related to the donee. Clearly, Jim Hannon as a trustee is not the recipient of any "gift" under the trust. Case law from other jurisdictions states that a lawyer-beneficiary's participation in the preparation or execution of the Will raises the presumption of undue influence, again, Mr. Hannon was not, nor can he be a beneficiary under Dianne's Will. A similar result is found when you review ABA Cannon 5, ethical consideration 5-6, that states a lawyer shall not conscientiously influence a client to name him as executor, trustee, or

Exhibit A

care shall be taken by the lawyer to avoid even the appearance of impropriety. I think Mr. Hannon covered in his deposition, the fact that it was Dianne who wished Jim Hannon and her other attorneys, to serve as co-trustees.

In any event, there are two separate issues. You asked if Jim Hannon had considered the fact that he had named himself as trustee, to be an ethical violation. If you view it as an unethical violation, you have a duty to report Mr. Hannon to the bar. An entirely separate issue is whether the fact that Jim Hannon is named as a trustee causes the entire gift to fail, which is exactly what you insinuated during the deposition. There simply isn't any legal basis to support your allegation.

Next, in the deposition you raised the theory that if these attorney trustees resigned, and since there is no provision for replacement, the trust would fail. Once again, there is no legal theory to support your claim. Please look at Idaho Code §68-101 and Idaho Code §68-102. The trust survives the renunciation of other trustees, and if, by chance, all the trustees should renounce, the District Court must appoint replacements.

You mentioned that all of the attorney trustees had renounced their interest in serving as trustees, but that begs the question. The foundation hasn't been created yet, due to your client's failure to perform his duties as personal representative. I don't see how any renunciation can be valid until the estate kicks loose the funds to create the foundation.

After the deposition, you asked about the possibility of settlement. The Idaho Trial Lawyers Association is certainly interested in settlement. When you discussed settlement, you mentioned the possibility of this case being dragged out, and the specter of attorney fees reducing the value of any money that could be available for the foundation. I suggest you take another look at the probate code to determine who will be paying for your attorney's fees. Since the probate was converted to a formal probate, you cannot receive attorney's fees out of probate assets without the court's prior approval. While I agree that your office would be entitled to attorney's fees for preparing the initial probate pleadings, your office is not entitled to any other attorney fees for time spent contesting the validity of the Will. It would be unethical for an attorney to charge attorney's fees against the estate for such an action, as the personal representative has a duty to the legacies under the Will, to enforce the Will and defend the Will, not contest the Will. Additionally, the personal representative has a duty to maximize the estate left for the legacies. The personal representative simply cannot challenge the validity of the Will, and seek to have his attorney fees for doing so paid from the assets from the estate. I direct your attention to Idaho Code §15-3-703(a), Idaho Code §15-3-709, Idaho Code §15-3-712 and Idaho Code §15-3-715(21)

I also don't see how you are going to get your attorney fees paid for out of the estate, for time spent discussing matters with me, since the vast majority of that time has been spent with my trying to get you to get your client to meet his duties under Idaho law to the beneficiaries under the Will.

My suggestion is as follows. Your client prepares a detailed inventory and accounting that can be verified, and find out what is left over after the payment of legitimate expenses. This would include itemized statements of the interest bearing account showing what interest has accrued since the account's inception, and also what expenses have been paid by the estate since the decedent's death and what expenses are claimed and unpaid against the estate. The trustees can then convene to determine what is to be done with the remaining funds.

Very truly yours,

John T. Mitchell

JTM:cs
Enc.
cc: Kay Shields
Jim Hannon

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
__✓__ Facsimile: (208) 664-1684

John P. Whelan

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d'Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-03-04621

REQUEST FOR JUDICIAL NOTICE

HEARING DATE: August 7, 2007
TIME: 4:00 p.m.
JUDGE: John T. Mitchell

Defendants, Douglas P. Lawrence and Brenda J. Lawrence, by and through their attorney, John P. Whelan, in accordance with Rules of Evidence Rule 201 and Idaho Rules of Civil Procedure Rule 44(d), hereby request that the Court take judicial notice of the matters identified herein, which matters are referenced in

the Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment:

1. Court files regarding case of *Louden v. Stokes, McFeron, Wolfe*, Case Number 65077, Kootenai County District Court, 1987.

2. That Metsker maps have been relied upon for their accuracy for many decades and the maps are readily verifiable.

DATED this 24 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

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ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

MOTION FOR ENLARGEMENT

HEARING DATE: August 7, 2007

TIME: 4:00 p.m.

JUDGE: JOHN T. MITCHELL

COMES NOW the Defendants, Douglas Lawrence and Brenda Lawrence, by and through their counsel of record, John P. Whelan, and hereby motion this court, pursuant to Rules 6(b) and 56(c) and 56(f) of the Idaho Rules of Civil Procedure, for an enlargement of time in which to file their opposition in response to Plaintiff's motion for summary judgment. Defendants request to

file their response on or after November 1, 2007. The affidavits of John P. Whelan and Doug Lawrence are offered in support of this motion. Defendant's request oral argument.

This motion is made on the grounds that Defendant's have not had the opportunity to complete discovery and determine the whereabouts of the various witnesses whose affidavits are relied upon by Plaintiff, as Plaintiff's counsel filed a motion for summary judgment shortly after the Remittitur issued in this case. Defendants made a prior motion for enlargement that was never ruled upon by the Court. No further discovery has taken place since the motion was made due to the fact that the Court has yet to rule on the original motion for enlargement. Defendants have yet to complete their discovery in the instant action, so additional time to respond to Plaintiffs motion for summary judgment is warranted. Defendants anticipate that they will take the depositions of each person who has submitted an affidavit for Plaintiff in this action. Many of the witnesses are believed to reside out of state.

DATED this 24 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan

John P. Whelan

Attorney for Defendants

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CAPSTAR RADIO OPERATING COMPANY, a Delaware corporation,

Plaintiff,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

CASE NO. CV-02-7671

MOTION TO STRIKE

HEARING DATE: August 7, 2007
TIME: 4:00 p.m.
JUDGE: JOHN T. MITCHELL

Plaintiffs, Douglas Lawrence and Brenda Lawrence, by and through their attorney of record, John P. Whelan, hereby move the court to strike the objectionable portions of the Affidavits of Harold Funk and John Rook, identified herein, which affidavits were offered in support to Plaintiff's motion for summary judgment. This motion is made on the grounds of I.R.C.P. Rule

7(b)(1), 12(f) and 56(e) and the case of *Posey v. Ford Motor Credit Co.*, 111 P. 3d 162 (Id. Ct App. 2005). Defendants requests oral argument.

AFFIDAVIT OF FUNK

Defendants move to strike the following portions of the Affidavit of Harold Funk:

	Location in Affidavit	Ground for Objection	Comment
1.	Paragraph 2, pg. 2, last sentence	Relevance; hearsay	Funk's contract with his predecessor is irrelevant under the doctrine of merger.[1]
2.	Paragraph 3, pg. 2, last sentence	Relevance; hearsay; foundation.	Funk's contract with his predecessor is irrelevant under the doctrine of merger.
3.	Paragraph 4, pg. 2, 1st sentence	Foundation; relevance	Funk fails to identify the relevant time period.
4.	Paragraph 6, pg. 3, 4th through 7th sentences	Relevance; hearsay; foundation (7th sentence)	Funk's sale agreement merged into the deed to Human Synergistics.
5	Paragraph 6, pg. 3, 8th and 9th sentences	Relevance; parole evidence	The Funk's intent is irrelevant parole evidence in that the land contract merged with the deed and the deed is not ambiguous.

[1] Defendants move to strike Ex. A on the same grounds.

6.	Paragraph 6, pg. 4, second to last sentence	Foundation	Funk's conclusionary statement of "continuous use" is not supported by foundation.
7.	Paragraph 6, pg. 4, last sentence	Relevance; hearsay	The sale agreement merged with the deed; therefore the land sale contract is irrelevant in that the deed is unambiguous.
8.	Paragraph 9, pg. 4, 1st sentence	Foundation; relevance	Funk does not identify which parcel he refers to, rendering the statement irrelevant. Funk also does not identify which "same private road" he refers to, and whether the road is on the Lawrence parcel.
9.	Paragraph 9, pg. 4, 2nd and 3rd sentences	Foundation; relevance[2]	

[2] Defendants also move to strike Ex. "F" as well as hearsay evidence.

AFFIDAVIT OF ROOK

Defendants move to strike the following portions of the Affidavit of John Rook:

	Location in Affidavit	Ground for Objection	Comment
1.	Paragraph 3, pg. 2, 2nd sentence	Foundation; relevance	Rook does not lay the foundation for his claimed knowledge of the access to the parcels; Rook does not identify "the road" he refers to or its location.
2.	Paragraph 4, pg. 2, 1st sentence	Foundation; relevance	Rook does not lay the foundation for his alleged knowledge of the access to the Funk land; he does not identify the subject road or its location.

3.	Paragraph 4, pg. 2, 2nd sentence	Foundation; relevance; improper opinion evidence	Rook does not lay the foundation for his claimed knowledge of the road location; Rook attempts to offer an expert opinion as a surveyor without foundation. At best, Rook only identifies "the road" as being located in the 160 acres of the SE 1/4 of Section 21, T50, R5W, of which the Lawrences own only a portion.
4.	Paragraph 4, pg. 3, 3rd, 4th and 5th sentences	Foundation; relevance	Rook claims to have knowledge of Funk's habits but lays no foundation; the "road" location is not identified.
5.	Paragraph 4, pg. 3, last sentence	Foundation; relevance	No facts are offered in support of this conclusionary statement regarding the use of the road.
6.	Paragraph 5, pg. 3; Exhibit "C"	Foundation; hearsay; relevance.	No foundation is laid for the hearsay map.

7.	Paragraph 6, pg. 3	Foundation; relevance; improper opinion evidence	No foundation is laid for the claim regarding Funk's access or the opinion rendered.

DATED this 24 day of July, 2007.

JOHN P. WHELAN, P.C.

By: John P. Whelan
John P. Whelan
Attorney for Defendants

CERTIFICATE OF SERVICE

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STATE OF IDAHO)
) ss.
County of Kootenai)

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1. I am the attorney for Defendants, Douglas Lawrence and Brenda Lawrence. I have personal knowledge of the following facts and could

competently testify. This affidavit is offered in support of Defendants' motion for reconsideration of an order of the Court denying Defendants' motion for disqualification for cause pursuant to I.R.C.P. 40(d)(2) filed on June 25, 2007.

2. On behalf of the Lawrences I filed a motion requesting that the Honorable John T. Mitchell disqualify himself for cause due to bias and/or prejudice against your affiant. The Court did not rule on the motion when the oral argument was presented on June 13, 2007, the matter was taken under submission

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DATED this 24 day of July, 2007.

JOHN P. WHELAN, P.C.

John P. Whelan
Attorney for Defendants

Subscribed and sworn before me this 24TH day of July, 2007.

JESSICA TVRDY NOTARY PUBLIC STATE OF IDAHO

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December 1, 2000

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Exhibit A

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You mentioned that all of the attorney trustees had renounced their interest in serving as trustees, but that begs the question. The foundation hasn't been created yet, due to your client's failure to perform his duties as personal representative. I don't see how any renunciation can be valid until the estate kicks loose the funds to create the foundation.

After the deposition, you asked about the possibility of settlement. The Idaho Trial Lawyers Association is certainly interested in settlement. When you discussed settlement, you mentioned the possibility of this case being dragged out, and the specter of attorney fees reducing the value of any money that could be available for the foundation. I suggest you take another look at the probate code to determine who will be paying for your attorney's fees. Since the probate was converted to a formal probate, you cannot receive attorney's fees out of probate assets without the court's prior approval. While I agree that your office would be entitled to attorney's fees for preparing the initial probate pleadings, your office is not entitled to any other attorney fees for time spent contesting the validity of the Will. It would be unethical for an attorney to charge attorney's fees against the estate for such an action, as the personal representative has a duty to the legacies under the Will, to enforce the Will and defend the Will, not contest the Will. Additionally, the personal representative has a duty to maximize the estate left for the legacies. The personal representative simply cannot challenge the validity of the Will, and seek to have his attorney fees for doing so paid from the assets from the estate. I direct your attention to Idaho Code §15-3-703(a), Idaho Code §15-3-709, Idaho Code §15-3-712 and Idaho Code §15-3-715(21).

I also don't see how you are going to get your attorney fees paid for out of the estate, for time spent discussing matters with me, since the vast majority of that time has been spent with my trying to get you to get your client to meet his duties under Idaho law to the beneficiaries under the Will.

My suggestion is as follows. Your client prepares a detailed inventory and accounting that can be verified, and find out what is left over after the payment of legitimate expenses. This would include itemized statements of the interest bearing account showing what interest has accrued since the account's inception, and also what expenses have been paid by the estate since the decedent's death and what expenses are claimed and unpaid against the estate. The trustees can then convene to determine what is to be done with the remaining funds.

Very truly yours,

John T. Mitchell

JTM:cs
Enc.
cc: Kay Shields
Jim Hannon

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of July, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1875 N. Lakewood Drive
Suite 200
Coeur d' Alene, ID 83814

Via: ____ U.S. Mail, postage prepaid
____✓ Facsimile: (208) 664-1684

John P. Whelan